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Supreme Court, U.S.
FILED

No. 98 960 DEC 2 1998

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1998

DEBORAH H. COBB,

Petitioner,

v.

E. I. duPONT de NEMOURS and COMPANY, a Delaware corporation, RICHARD KNOWLES, ELBERT PRICE, LESTER GORE, SCOTT RENDINELL, LOU P. MICELI, PAMELA POKRZYWA, REUBEN W. HOLLAND, M.D., and ROBERT L. LEADBETTER, M.D.

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals For the Fourth Circuit

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APPENDIX

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

DEBORAH H. COBB,
Plaintiff

v. Civil Action No. 2:95-0743

E. I. DU PONT DE NEMOURS AND COMPANY, a Delaware corporation; RICHARD KNOWLES; ELBERT PRICE; LESTER GORE; SCOTT RENDINELL; LOU P. MICELI; PAMELA POKRZYWA; REUBEN W. HOLLAND, M.D.; and ROBERT L. LEADBETTER, M.D.,
Defendants

MEMORANDUM ORDER

This matter is before the court on the motion for partial summary judgment filed by defendant E. I. DuPont de Nemours and Company on January 6, 1997, insofar as the motion is directed to plaintiff's Count I handicap discrimination claim and her Count IV fraudulent concealment claim against DuPont.[1]

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[1]By separate order this day entered, the court grants summary judgment against plaintiff with respect to her other fraudulent concealment claims, those being the ones brought against Pamela Pokrzywa, Reuben W. Holland, M.D., and Robert L. Leadbetter, M.D. In that order, the court indicates that it will separately address the fraudulent concealment claim insofar as it is directed towards DuPont by virtue of plaintiff's allegation that Diana Doran made false reports to the Workers' Compensation Fund on a Form 123. (See Order entered this day granting summary judgment in favor of Pokrzywa, Holland and Leadbetter at 5, note 4.)

Appendix

A. Summary Judgment Standard.

A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Material facts are those necessary to establish the elements of a party's cause of action under controlling substantive law. Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986). Only those facts which would affect the outcome of the case are "material." Id. If essential facts specifically averred by opposing parties are contradictory, the motion must be denied. Lujan v. National Wildlife Fed'n, 497 U.S. 871, 888 (1990). On the other hand, DuPont is entitled to summary judgment if plaintiff has failed to establish an essential element of her causes of action. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). That is, DuPont may satisfy its requirement of showing that it is "entitled to judgment as a matter of law" by showing that there is an absence of evidence to support plaintiff's claims. Cray Communications, Inc. v. Novatel Computer Sys., Inc., 33 F.3d 390, 393-94 (4th Cir. 1994), cert. denied, 115 S. Ct. 1254 (1995). It need not present affidavits or other materials negating plaintiff's claim. Id. at 394. DuPont is also entitled to summary judgment in its favor if "the record as

a whole could not lead a rational trier of fact to find" in favor of the plaintiff. Williams v. Griffin, 952 F.2d 820, 823 (4th Cir. 1991) (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986))

In reviewing the evidence, the court must not resolve disputed facts, weigh the evidence, Ross v. Communications Satellite Corp., 759 F.2d 355, 364 (4th Cir. 1985), or make determinations of credibility, Sosebee v. Murphy, 797 F.2d 179, 182 (4th Cir. 1986). Indeed, plaintiff is entitled to have his version of the facts accepted as true and all internal conflicts resolved in his favor. Charbonnages de France v. Smith, 597 F.2d 406, 414 (4th Cir. 1979) (quoting Pierce v. Ford Motor Co., 190 F.2d 910, 915 (4th Cir.), cert. denied, 342 U.S. 887 (1951)) Nonetheless, a properly supported motion for summary judgment cannot be defeated by evidence that is "merely colorable," M&M Medical Supplies v. Pleasant Valley Hosp., 981 F.2d 160, 163 (4th Cir. 1992), cert. denied, 508 U.S. 972 (1993) (quoting Anderson 477 U.S. at 249-50), or by mere conclusory allegations or denials in the opposing party's pleadings or affidavits, or by "presuming" missing facts. Lujan, 497 U.S. at 889. Rather, the party opposing the motion for summary judgment must offer an affidavit or otherwise set forth specific facts that demonstrate that there is a genuine issue for trial in order to oppose a summary judgment motion. Fed. R. Civ. P. 56(e)

B. Fraudulent Concealment.

Plaintiff's factual assertions with respect to her fraudulent concealment claim are confined to actions taken by defendants Pamela Pokrzywa, Reuben W. Holland, M.D., and Robert L. Leadbetter, M.D., and by Diana Doran, DuPont's benefits administrator. Having disposed of the claims against Pokrzywa, Holland and Leadbetter by separate order, the court turns to plaintiff's allegation that Doran made false reportings to the workers' compensation fund.

As an initial matter, the court notes that plaintiff's complaint makes no reference to Doran and contains no allegation of false reporting to the workers' compensation fund. Nevertheless, when plaintiff filed her July 8, 1996, verified statement of facts relied on to support her claims, (hereinafter, Statement of Facts),[2] she stated, as part of her Count IV fraudulent

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[2]The Statement of Facts filed by plaintiff on July 8, 1996, was submitted in response to the court's order of June 5, 1996, requiring her to provide a statement of the facts on which she relies to support the allegations in the complaint and advising her that her failure to supply the information then known might result in an order barring the use of facts not then disclosed. (Order entered June 5, 1996.) Plaintiff's obligation to provide that information arose from defendants' first set of interrogatories, served on November 20, 1995, asking plaintiff to state with particularity the facts relied on to support her complaint. (See Mag. Judge Order entered Mar. 22, 1996, at 4.) No response was made until after a motion to compel was filed and then the response was only by reference to her deposition testimony. By order entered on March 22, 1996, the magistrate judge ruled that "[p]laintiff's reference to her deposition testimony is not a sufficient or proper response" and ordered her to fully respond

concealment claim, that she will present evidence of "the false reporting to Workers' Compensation that [she] suffered no health problems or complaints while employed to deny her consideration for any benefits," and of "the false reporting to Workers' Compensation of no lost work time for illness when [she] had taken a substantial number of days of sick leave to falsely conceal the possibility of occupationally-induced health problems." (DuPont's Mot., Ex. 4, Statement of Facts at 9.)

Immediately following those assertions is this additional statement about the false reporting allegations:

> Diana Doran completed a Form 123 for Workers' Compensation which reported that Deborah Cobb had no lost work days and had no medical or health complaints. This was an intentional and complete misrepresentation as evidenced by Dupont's own corporate records regarding Deborah Cobb's sick leave and was fully available to Ms. Doran as the Benefits Administrator charged with responsibility for completing Form 123 for Dupont.

(Id.)

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by March 19, 1996, and "set forth in particularity the facts she possesses that support the allegations in her Complaint." (Id. at 4, 6.) On plaintiff's appeal, the court modified the order of the magistrate judge to provide that plaintiff could have until June 10, 1996, to provide the statement of facts. (Order entered June 5, 1996, Docket Entry No. 159 at 3.)

Materials presented on June 11, 1996, were stricken as not in compliance with the court's order, but the court accepted supplemental information submitted on June 14, 1996, when it was presented in slightly modified form, under oath of the plaintiff, on July 8, 1996. (See Order entered June 26, 1996, at 6-9.)

Appendix

In Persinger v. Peabody Coal Co., 474 S.E.2d 887 (W. Va. 1996), the West Virginia Supreme Court of Appeals held that notwithstanding the statutory immunity available to contributing employers under section 23-2-6 of West Virginia's Workers' Compensation Act, W. Va. Code § 23-2-6, there are circumstances under which an employee may maintain a fraudulent concealment claim against the employer. Id. at 897. More particularly, the court held that:

> West Virginia Code § 23-2-6 does not preclude an employee from maintaining a separate and distinct cause of action against an employer for damages as a result of the employer knowingly and intentionally fraudulently misrepresenting facts to the Workers' Compensation Fund that are not only in opposition to the employee's claim, but are made with the intention of depriving the employee of benefits rightfully due him.

Id.

However, because of the statutory right of the employer "to contest the compensability of an employee's injury and/or to object to any subsequent finding or award," the cause of action is to be narrowly construed. Id. In addition, in order to insure that the cause of action reaches only "outrageous reprehensible conduct" falling outside the "permissible boundary of protected behavior," the allegation of fraud must be pled in keeping with West Virginia Rule of Civil Procedure 9(b), which, like its federal counterpart, Fed. R. Civ. P. 9(b), requires that

circumstances constituting fraud be stated "with particularity." Id. at 898. The court elaborated:

> [A]n employee's cause of action against his/her employer for fraudulent misrepresentation concerning the employee's workers' compensation claim must be pled with particularity and must be supported by factual allegations identifying the employer's particular acts or circumstances which distinguish the intentional tort of fraudulent misrepresentation from the employer's negligent misrepresentation or mere delay in processing or payment of said claim, the latter two of which are not sufficient to support an employee's independent cause of action.

Id.

"More specifically," for the plaintiff to prevail, the claim must be pled "with particularity, specifically identifying the facts and circumstances that constitute the fraudulent misrepresentation." Id. at 899. Among the circumstances which must be particularly averred are "matter[s] such as the time, place, and conten[t]s of the false representations, as well as the identity of those persons involved." Id. (quoting with approval Barr Co. v. Safeco Ins. Co., 583 F. Supp. 248, 258 (N.D. Ill. 1984)). In addition, all essential elements of the claim, "including the injury resulting from the fraudulent conduct," must be proven by clear and convincing evidence. Id.

Appendix

Relying on the pleading requirements attendant to the fraudulent concealment cause of action first recognized in Persinger, DuPont seeks dismissal of that portion of plaintiff's fraudulent concealment claim which is based on Doran's alleged misrepresentations to Workers' Compensation. According to DuPont, plaintiff's allegations are not particularized as to time, place and content and are only "vague" allegations of fraud without regard to "specific conduct or how it was executed." (DuPont's Mem. in Supp. at 41.) Thus, says DuPont, the claim based on Persinger must be dismissed.

Inasmuch as DuPont appears to proceed as if the Statement of Facts were a more definite statement, challenging only the particularity with which plaintiff states her averment of fraudulent misrepresentation of facts to the Workers' Compensation Fund, the court will regard the Statement of Facts as a more definite statement of the fraudulent concealment claim contained in Count IV of the complaint. In addition, although the argument is made in the context of a motion for summary judgment, it is seen that DuPont asks for dismissal of the cause of action. The court accordingly evaluates plaintiff's claim of false reporting to Workers' Compensation under standards applicable to a motion to dismiss for failure to state the averments of fraud with particularity as required by the West Virginia Supreme Court of Appeals in Persinger.

Appendix

Although plaintiff's Statement of Facts does not identify when the alleged misrepresentation was made, she identifies Doran as the person responsible for making it and Workers' Compensation as the recipient of the false information. The false contents are described with enough specificity for DuPont to understand what plaintiff alleges to be false. In addition, plaintiff's assertion that the false reporting was done in order "to deny her consideration for any benefits" and "to falsely conceal the possibility of occupationally-induced health problems" satisfies the requirement that the misrepresentation be made in opposition to her claim and with the intent of depriving her of benefits rightfully due, all as required by the West Virginia Supreme Court of Appeals in Persinger. Further, it may be inferred, from the allegation that DuPont's "own corporate records" regarding plaintiff's "sick leave" were "fully available" to Doran, that the misrepresentation, if any be proven, was an intentional, rather than negligent, act. Consequently, the court concludes that plaintiff's pleading of the claim for fraudulent misrepresentation concerning her workers' compensation claim, as amplified in her Statement of Facts, is stated with sufficient particularity to permit DuPont to prepare a defense to the claim and survive dismissal. See Hager v. Exxon Corp., 241 S.E.2d 920, 923 (W. Va. 1978) (stating that the rationale for the strict pleading requirement of Rule 9(b) "is to permit the party charged with fraud the opportunity to prepare a defense")

DuPont's motion for summary judgment will be denied insofar as it seeks dismissal of the Count IV claim for fraudulent misrepresentation concerning plaintiff's workers' compensation claim. At trial, plaintiff must, as required by Persinger, present evidence "persuasive enough for both the judge and jury to find substantial, outrageous and reprehensible conduct which falls outside of the permissible boundary of protected behavior under the [worker's compensation] statute" in order to prevail on her claim, Persinger, 474 S.E.2d at 899.

It is further noted that plaintiff's contention that she was deprived of the opportunity to conduct discovery on the claim of fraudulent misrepresentation concerning a workers' compensation claim is unavailing and cannot satisfy the burden of proof she bears at trial. As earlier indicated, plaintiff's complaint did not mention Doran and did not contain any allegations of false reporting of information to Workers' Compensation. The claim here allowed was set forth for the first time on July 8, 1996, in plaintiff's Statement of Facts. Prior to that time, plaintiff undertook to depose Doran.[3] The deposition was terminated by counsel for DuPont when inquiry was made of her into workers' compensation matters, it being the position of DuPont

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[3]Aside from noticing the deposition of Doran, plaintiff refers to no other discovery efforts regarding the claim for fraudulent misrepresentation concerning her workers' compensation claim.

that Doran had previously been deposed on those matters in plaintiff's workers' compensation case. (See Magistrate Judge Order entered Mar. 22, 1996, at 2-3, Docket Entry No. 131.) Plaintiff moved to compel the further deposition of Doran. The magistrate judge found no basis for compelling her further deposition on workers' compensation matters inasmuch as "she has already been deposed in Plaintiff's Workers' Compensation matter and this civil action is a separate and distinct action." (Id. at 2.) He accordingly ruled that the deposition of Doran had been completed. (Id. at 2-3.)[4]

Plaintiff appealed. At a hearing on the appeal, conducted before this court on May 31, 1996, counsel stated that he wanted to pursue the deposition of Doran to prove further actions by DuPont to deprive plaintiff "of matters that she was entitled to; in this case, the Workers' Comp case, Your Honor." (Tr. May 31, 1996, Hr'g at 9, Docket Entry No. 160.) He explained that it was plaintiff's position that she was denied

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[4]At the hearing conducted before the magistrate judge, counsel for plaintiff stated that he wanted to take Doran's further deposition because her earlier deposition "showed that this was the only case that she had ever contacted Workers' Compensation in and clearly goes to the ongoing practice by DuPont, in Mrs. Cobb's case, to create a hostile work environment, and this helps show that hostile work environment, Your Honor." (Tr. Mar. 11, 1996, Hr'g at 4, Docket Entry No. 130.) Thus, it is seen that in addition to the absence of a false reporting claim at that time, plaintiff did not state a need to further depose Doran for the purpose of inquiring into allegations of false reporting and a possible future claim based on that allegation.

workers' compensation benefits "on the basis of misrepresentations placed in the application -- the response to the application for benefits which was signed by Diana Doran." (Id.) He wanted to develop that in further deposition, but was precluded from doing so when counsel for DuPont refused to permit questions of her, in this civil litigation, about workers' compensation. (Id.) The stated purpose was to obtain "further proof of retaliatory actions by DuPont and their employees which was a result of the discrimination committed against Mrs. Cobb." (Id. at 10.) In response, counsel for DuPont stated its position that the workers' compensation matter was "totally separate" and should be litigated in the workers' compensation forum, there being no allegation in plaintiff's complaint or in any response to discovery that demonstrated that the discriminatory conducted described by counsel for plaintiff was a part of this litigation. (Id.)

After hearing the parties, and with the understanding that DuPont was agreeable to the further deposition of Doran on a showing by plaintiff that her testimony, already given, was at odds with the testimony of other witnesses in plaintiff's pending workers' compensation case, the court orally ruled that the decision of the magistrate judge denying plaintiff's motion to compel further deposition of Doran was affirmed. (Id. at 8-9, 38.) The ruling was subject to the provision that if "at a

subsequent stage of the case, the plaintiffs, in light of the development of the case at that point, wish to undertake to pursue that matter further, you can do it by a motion before the court. The court will take that matter up at that stage." (Id. at 38.) On June 5, 1996, the court entered its follow-up order affirming the magistrate judge's ruling with respect to the further deposition of Doran, "subject to plaintiff's right at a subsequent stage of the proceedings, but in no event later than June 17, 1996, to file a motion seeking further relief with respect to that ruling." (Order entered June 5, 1996, at 2.)

Plaintiff took no action to renew the deposition of Doran, even after filing the Statement of Facts on July 8, 1996, which set forth, for the first time, the allegations that Doran made false representations to workers' compensation, allegations which fortuitously were recognized by the West Virginia Supreme Court of Appeals four days later as constituting a cause of action excepted from the general immunity provisions of the Workers' Compensation Act. Having failed to take action earlier to obtain relief from the court's order of June 5, 1996, on the basis of the Persinger opinion, plaintiff cannot now contend that she was deprived of an adequate opportunity to conduct discovery on that claim.

C. Handicap Discrimination.

Plaintiff's Count I handicap discrimination claim is based on that portion of the West Virginia Human Rights Act, W. Va. Code § 5-11-1 through 5-11-19, which provides that "[i]t shall be an unlawful discriminatory practice . . . [f]or any employer to discriminate against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment if the individual is able and competent to perform the services required even if such individual is blind or handicapped." §5-11-9-(1). In a wrongful discharge case, in order to establish a prima facie case of employment discrimination on the basis of handicap under section 5-11-9(1), plaintiff must show that she (1) meets the definition of "handicapped," (2) is a "qualified handicapped person," and (3) was discharged from her job.[5] Morris Nursing Home v. West Virginia Human Rights Comm'n, 431 S.E.2d 353, 357 (W. Va. 1993)

To assist in the interpretation and implementation of the Human Rights Act, the West Virginia Human Rights Commission promulgated regulations applicable to discrimination against

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[5]It is conceded that DuPont did not discharge plaintiff. Thus, the third element of her handicap discrimination claim hinges on the assertion of constructive discharge resulting from intolerable conditions of employment, including DuPont's failure to make reasonable accommodations for her asserted handicaps. (Pl.'s Am. Resp. at 13-14.)

individuals with disabilities.[6] Id. at 358. The Human Rights Act and accompanying regulations define the terms "handicap" and "disability" as a person who has "[a] mental or physical impairment which substantially limits one or more of a person's major life activities." W. Va. Code, § 5-11-3(m); 77 W. Va. C.S.R. 2, § 2.1.1. "Major life activities" is defined as including "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." W. Va. Code § 5-11-3(m) (i); 77 W. Va. C.S.R. 2, B 2.6. "Substantially limits" means, inter alia, " [t]he inability to perform a major life activity that the average person in the general population can perform." 77 W. Va. C.S.R. 2, § 2.5. The regulations also provide that in the event of a dispute about the existence of a disability or the nature of the impairment, plaintiff has the burden of proving, "by reasonable medical opinions or records," (1) the nature of the disability, (2) any limitations caused by the disability, and (3) any restrictions on the individual's work activity. 77 W. Va. C.S.R. 1, § 3.1.

DuPont seeks summary judgment in its favor on plaintiff's handicap discrimination claim on the grounds that she

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[6]Although the Human Rights Act uses the word "handicap," the regulations use the "word 'disability' and its derivations in order to conform with the Americans with Disabilities Act of 1990." 77 W. Va. C.S.R. 1, § 1.1

cannot show that she is "handicapped" or that she is a "qualified handicapped person" or that she was constructively discharged from her job. In addition, DuPont contends that plaintiff is barred by the doctrine of judicial estoppel from seeking relief on her handicap discrimination claim.[7]

Inasmuch as there is a dispute between the parties over whether plaintiff is a person with a disability, she must present reasonable medical opinions or records substantiating the nature of the disability, any limitations caused by it, and any restrictions it imposed on her work activity. In response to the motion for summary judgment, plaintiff submits (1) a medical report from Thomas J. Romano, M.D., (Pl.'s Am. Resp., Ex. J); (2) a medical evaluation report prepared by Reuben W. Holland, Jr., M.D., (Pl.'s Am. Resp., Ex. K); and (3) medical records from D. L. Rasmussen, M.D. (Pl.'s Am. Resp., Ex. L).[8] According to

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[7]Defendants assert, and plaintiff does not dispute, that the Count I handicap discrimination claim is brought only against DuPont.

[8]In addition, plaintiff states:

> [P]laintiff places this Court on notice that the defendant's own corporate medical records maintained in the course of their business pertaining to this plaintiff's last five to six years of employment as disclosed in discovery by the defendant are devastatingly detailed evidence of the degree to which plaintiff's major life activities were significantly affected by her physical conditions as hereinbefore identified. These documents are in the possession of the defendant and are evidence in this case. These records refute the proffered

plaintiff, the three documents show that she is a "diagnosed asthmatic" and that she "suffers from chronic fatigue syndrome and significant immune system dysfunction, manifested by recurrent herpetic lesions of the spine, back and buttocks," all of which were known to defendant at least two years before she terminated her employment.[9] (Pl.'s Am. Resp. at 11.)

Looking first at the medical report of Dr. Romano, the court observes that it bears the date July 28, 1994, with the further notation "(Revised 11/9/94)." (Pl.'s Am. Resp., Ex. J.) The court notes, as well, that by order entered on September 5, 1996, plaintiff was precluded from offering Dr. Romano as an expert to be called at trial, in part because it was apparent that the report here submitted was generated by Dr. Romano on July 28, 1994, in connection with plaintiff's breast implant

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argument against plaintiff's claim for handicap discrimination.

The argument of counsel that plaintiff possesses documents which would defeat summary judgment does not satisfy the requirement of Rule 56 that her response "set forth specific facts showing that there is a genuine issue for trial," Fed. R. Civ. P. 56(e). It merely asks the court to "presum[e]" missing facts, an insufficient basis for defeating a properly supported motion for summary judgment. See Lujan v. National Wildlife Fed'n, 497 U.S. 871, 889 (1990)

[9]By comparison, plaintiff alleged in her complaint that she was a handicapped person because of "diagnosed pulmonary disease, inflammatory disease, hypertension, and chronic fatigue syndrome." (Compl. at 6, ¶ 20.) In her Statement of Facts, she identified her handicapping conditions as being "asthma, hypertension, chronic fatigue syndrome, chronic viral lesions, and depression." (Statement of Facts at 2.)

litigation. (Order entered Sept. 5, 1996, at 3.) The revised November 9, 1994, report is identical to the report generated on July 28, 1994, except for the deletion of references to plaintiff's breast implants, their subsequent removal, and the opinion that plaintiff suffers from a "compensable condition." (Id. at 3.) Inasmuch as the report was prepared in connection with different litigation and did not meet the requirements of Rule 26(a) (2) (B) of the Federal Rules of Civil Procedure, including the requirement that the report contain a statement of opinion about an issue in this case, the court prohibited plaintiff from calling Dr. Romano as a witness at trial. (Id. at 4.)

Although plaintiff is barred from calling Dr. Romano to testify at trial, under 77 W. Va. C.S.R. 3, section 3.1, his records might nevertheless be sufficient to demonstrate the nature of plaintiff's disability, the limitations caused by it, and any restrictions it imposes on her work activity. Based on plaintiff's history and his physical examination of her, Dr. Romano's report states his "IMPRESSION" as being that plaintiff suffers from: "Atypical Connective Tissue Disease/Atypical Rheumatic Syndrome/Nonspecific Autoimmune Condition characterize by Symptom Groupings Raynaud's Phenomenon, Myalgias, Immune mediated skin changes, documented arthralgias, document myalgias, chronic fatigue (> 6 months), documented neurological symptoms including cognitive dysfunction or paresthesias, documented sleep

disturbances and burning pain in the chest, breast, arms or axilla." (Pl.'s Am. Resp., Ex. J at 2.) In recording the history plaintiff presented, the report also states that "[i]t is hard for her to perform her activities of daily living. She used to be very active, however, she now can no longer play tennis, swim or walk for any great distance. It is hard for her to plant flowers." (Id. at 1.)

Looking at the entirety of Dr. Romano's report in conjunction with the requirements of section 3.1, it may be that his statement of impressions simply employs different terminology to describe some of the disabilities plaintiff claims she suffered during her employment with DuPont such that it satisfies the requirement of section 3.1.1 that plaintiff present reasonable medical opinions or records showing the nature of the disability. To the extent that it discusses plaintiff's reported difficulties in engaging in certain activities, it may also be said that it describes certain limitations. Nevertheless, the report does not provide any evidence of limitations which are caused by a disability of the nature described. That is, it does not state a causal association between a disability and its limitations. Nor does it contain any mention of restrictions on plaintiff's work activity. The report accordingly fails to satisfy at least the last two requirements of section 3.1.

Moreover, assuming, without deciding, that Dr. Romano's report would be sufficient to establish that plaintiff meets the definition of "handicapped," she presents no evidence that DuPont knew or should have known of the information there contained, other than the bald assertion of counsel that the report "was, and is, part of the business records maintained" by DuPont. (Pl.'s Am. Resp. at 11.) Plaintiff terminated her employment with DuPont on September 15, 1994. (DuPont's Mot., Ex. 1, Deborah Cobb Dep. of Jan. 15, 1996, at 83.) The version of Dr. Romano's letter relied on to defeat summary judgment contains two dates: July 28, 1994, and the "Revised" date of 11/9/94. The record is devoid of evidence of the date of receipt of the report by DuPont,[10] but it plainly was not prepared until after "the years of 1989, 1990, 1991, 1992, 1993," the years which, in her response to the motion for summary judgment, plaintiff "advises the Court" are the years for which the handicap discrimination claim is brought and the years during which she "was not accommodated." (Pl.'s Am. Resp. at 13.) Consequently, even assuming that Dr. Romano's report could be used to establish that plaintiff met the definition of handicapped on November 9, 1994, or even on July 28, 1994, while she was still employed, it does not constitute evidence that DuPont had knowledge of the handicap and

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[10]DuPont concedes that it received the report as part of plaintiff's post-employment application for total and permanent disability benefits. (DuPont Reply at 4, note 2.)

discriminated against her because of it such that she could ultimately prevail on her handicap discrimination claim. See Morris, 431 S.E.2d at 359 (noting that plaintiff's ultimate burden on West Virginia Human Rights Act handicap discrimination claim was met, in part, by evidence showing that defendant "knew, or at least was on notice of," plaintiff's impairment); cf. Burns v. City of Columbus, 91 F.3d 836, 843 (6th Cir. 1996) (under similar federal statute, the Rehabilitation Act of 1973, 29 U.S.C.A. B 794, plaintiff could not defeat properly supported motion for summary judgment when he presented no evidence that defendant "knew or believed that he was handicapped"); Deghand v. Wal-Mart Stores, Inc., 926 F. Supp. 1002, 1011 (D. Kan. 1996) (under similar federal statute, the Americans with Disabilities Act of 1990, (ADA), 42 U.S.C.A. S 12112(a), plaintiff's prima facie case requires a showing of an adverse employment decision "because of ... disability"); Gore v. GTE South, Inc., 917 F. Supp. 1564, 1573 (M.D. Ala. 1996) (plaintiff could not prevail on ADA claim in absence of assertion that employer had knowledge of disability at the time adverse employment decision was made)

The second document relied on by plaintiff to show that she meets the definition of handicapped is a medical evaluation report completed by Dr. Holland and dated October 19, 1994. (Pl.'s Am. Resp., Ex. K.) It appears that the report was prepared in the course of plaintiff's application for disability

benefits. (Id. at 2.) Although it contains "[d]iagnoses" of various conditions, including "recurrent herpetic lesion buttock" and "asthma," it appears that the diagnoses are based on information obtained from plaintiff, rather than on independent examination. (Id.) For example, the report states that plaintiff "declined examination of her buttock area," (id.), which indicates that the diagnosis of "recurrent herpetic lesion buttock" was not based on Dr. Holland's physical examination, but rather on information supplied by plaintiff. Similarly, there is no indication of physical findings of asthma, but only that "[a]sthma was diagnosed, she reports, in 1993." (Id. at 3.) In addition, the report does not contain a finding of any limitation caused by a disability, beyond stating that "Ms. Cobb . . . applies for disability on the basis of conditions which are in her words 'very serious and debilitating and the work-related problems under which I have been functioning has (sic) greatly exacerbated these conditions to the point where I am unable to seek out and maintain gainful employment.'" (Id. at 3.)

Moreover, as with the report of Dr. Romano, the report of Dr. Holland, completed after plaintiff terminated her employment, cannot support a finding that DuPont had knowledge or notice of a disability and knowingly failed to make reasonable accommodation, resulting in conditions which were so intolerable that it was reasonable for plaintiff to leave her employment.

See Slack v. Kanawha County Housing & Redev. Auth., 423 S.E.2d 547, 557-58 (W. Va. 1992) (plaintiff alleging constructive discharge must "establish that working conditions created by or known to the employer were so intolerable that a reasonable person would be compelled to quit"). The third submission, medical records of Dr. Rasmussen, fails for the same reason, it being stated on the first entry that plaintiff was seen as a "new'" patient on November 1, 1994, (Pl.'s Am. Resp., Ex. L at 1), more than six weeks after she ceased work.[11]

Inasmuch as plaintiff has presented no "reasonable medical opinions or records" showing that she met the definition of handicapped while in the employ of DuPont and no evidence tending to show that DuPont knew or should have known that she was a handicapped person for whom it had a duty to make reasonable accommodation, no reasonable jury could find that DuPont

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[11]Plaintiff states in her responding memoranda that she "appended as Exhibit 'L' Dr. Rasmussen's diagnosis while plaintiff was still employed." (Pl.'s Am. Resp. at 12.) She further says that "Dr. Rasmussen is, and was, the treating pulmonologist at all times relevant to this matter." (Id.) In that regard, it may be conceded that Dr. Rasmussen's office note of November 1, 1994, states that plaintiff came in "with chief report of 'asthma,'" which she reported started in 1993. (Pl.'s Am. Resp., Ex. L at 1-2.) However, the first entry in Dr. Rasmussen's record is dated November 1, 1994, with the notation that plaintiff is a new patient, and, at deposition, he confirmed that he first saw plaintiff on that date and that his records only reported her subjective complaints and her self-reported diagnosis of asthma. (DuPont Mot., Ex. 6, Rasmussen Dep. of Mar. 26, 1996, at 4, 11, 15.) His records thus do not sustain a finding that he diagnosed plaintiff's asthmatic condition while she was still employed.

discriminated against her because of her handicap. Plaintiff having failed to establish essential elements of her handicap discrimination claim, DuPont is entitled to judgment in its favor on Count I of plaintiff's complaint.[12]

For the reasons stated, it is **ORDERED** that the motion for partial summary judgment filed by defendant E. I. DuPont de Nemours and Company on January 6, 1997, be, and it hereby is, denied in part and granted in part. It is accordingly further **ORDERED** that:

1. The motion be, and it hereby is, denied only insofar as it pertains to plaintiff's Count IV claim against

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[12]Even assuming that plaintiff could establish that she was a "handicapped" person during the tenure of her employment, there is no evidence before the court showing that she is a "qualified handicapped person"; that is, a person who, with reasonable accommodation, was able and competent to perform the job. Morris, 431 S.E.2d at 358. To the contrary, on September 30, 1994, two weeks after she ceased working, she wrote to DuPont for the purpose of applying for "total and permanent disability benefits." (DuPont Mot., Ex. 10.) The letter states in pertinent part: "It has become very apparent to me since my leaving that I am not physically able to engage in any employment due to my present physical condition and greatly impaired health I am unable to seek and maintain gainful employment." (Id.) Consistent therewith, plaintiff has not sought employment elsewhere, (DuPont Mot., Ex. 1, Deborah Cobb Dep. of Jan. 15, 1996, at 83), and has applied for Social Security disability benefits, (DuPont Mot., Ex. 21, Deborah Cobb Dep. of Dec. 31, 1996, at 51) Inasmuch as all of the evidence before the court indicates that plaintiff was not able to work at the time she terminated her employment, she cannot demonstrate the essential element that she was a "qualified handicapped person."

E. I. DuPont de Nemours and Company for fraudulent misrepresentation concerning plaintiff's workers' compensation claim.

2. The motion be, and it hereby is, granted only insofar as it is directed to plaintiff's Count I claim for handicap discrimination.

The Clerk is directed to forward copies of this order to all counsel of record.

DATED: April 22, 1997

/s/ JOHN T. COPENHAVER, JR.
United States District Judge

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

DEBORAH H. COBB,
Plaintiff

v. Civil Action No. 2:95-0743

E. I. DU PONT DE NEMOURS AND COMPANY, a Delaware corporation; RICHARD KNOWLES; ELBERT PRICE; LESTER GORE; SCOTT RENDINELL; LOU P. MICELI; PAMELA POXRZYWA; REUBEN W. HOLLAND, M.D.; and ROBERT L, LEADBETTER, M.D.,
Defendants

MEMORANDUM ORDER

This matter is before the court on the motions for summary judgment filed on January 6, 1997, by defendants Richard Knowles, Lester Gore, Elbert Price, Scott Rendinell, and Lou P. Miceli[1] and the partial motion for summary judgment filed that same date by E. I. du Pont Nemours and Company insofar as the

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[1]The individual defendants are described in plaintiff's complaint as being her supervision and employee relations representatives." (Compl. at 2, g 3.) More specifically, Knowles was the plant manager; Price held the position of Superintendent of Business Services and Human Resources; Gore was an employee relations specialist; Rendinell was plaintiff's area supervisor from 1993 through September 1994; and Miceli was plaintiff's direct supervisor from April 1992 through September 1993.

motions relate to plaintiff's Count III claim for sexual harassment and her Count IV claim for the intentional infliction of emotional distress.

I.

Count III of plaintiff's complaint alleges generally that she was subjected by male co-workers and supervisory personnel to incidents of asexual harassment" and "unwanted sexual advances, specifically verbal and physical conduct and communication of a clear and explicit sexual nature,. occurring over a period of years; that the incidents were reported to supervisors and corporate officers, who should have taken timely and appropriate actions; and that the "repeated humiliation" and "subsequent false disciplinary actions taken against her" demonstrate "a pattern and practice of sexual harassment" which culminated in her constructive discharge in September 1994. (Compl. at 9-10.) The acts of the defendants are alleged to be in violation of the West Virginia Human Rights Act in that (1) the defendants conspired to commit acts for the purpose of harassing her; (2) failed to provide her with a place to work free from harassment; (3) failed to thoroughly investigate her complaints of sexual harassment; (4) failed to respond to her complaints of sexual harassment; and (5) that DuPont failed to take appropriate

disciplinary action or other action to prevent the harassment and instead, "promoted said personnel into other positions." (Compl. at 10-11.)

No specific incidents are described in the complaint and no particular defendants are identified in Count III, although the complaint elsewhere states that plaintiff was subjected to "sexually harassing conduct, as engaged in by Lester Gore, an Employee Relations Specialist, among others." (Id. at 5, ¶ 17.)

Thereafter, in her July 8, 1996, verified statement of facts relied on to support her claims, (hereinafter, Statement of Facts),[2] plaintiff states that she was subjected to sexually

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[2]The Statement of Facts filed by plaintiff on July 8, 1996, was submitted in response to the court's order of June 5, 1996, requiring her to provide a statement of the facts on which she relies to support the allegations in the complaint and advising her that her failure to supply the information then known might result in an order barring the use of facts not then disclosed. (Order entered June 5, 1996.) Plaintiff's obligation to provide that information arose from defendants' first set of interrogatories, served on November 20, 1995, asking plaintiff to state with particularity the facts relied on to support her complaint. (See Mag. Judge Order entered Mar. 22, 1996, at 4.) No response was made until after a motion to compel was filed and then the response was only by reference to her deposition testimony. By order, entered on March 22, 1996, the magistrate judge ruled that "[p]laintiff's reference to her deposition testimony is not a sufficient or proper response" and ordered her to fully respond by March 19, 1996, and "set forth in particularity the facts she possesses that support the allegations in her Complaint." (Id. at 4, 6.) On plaintiff's appeal, the court modified the order of the magistrate judge to provide that plaintiff could have until June 10, 1996, to provide the statement of facts. (Order entered June 5, 1996, Docket Entry No. 159 at 3.)

harassing conduct by defendants Richard Knowles and Lester Gore and by two DuPont employees, Damron Bradshaw and Kerry Crawfor who are not defendants in this action. In particular, the Statement of Facts states that plaintiff will present evidence that:

> 1. Mrs. Cobb has been physically touched by Richard Knowles and been subjected to other conduct by Mr. Knowles clearly suggestive and sexual in nature.
> 2. Lester Gore has directly requested Mrs. Cobb expose her breasts, exchange pictures of each others genitalia, as well as other similar acts prohibited by law.
> 3. Damron Bradshaw has disseminated sexually explicit pictures around the work place and embarrassed and humiliated Deborah Cobb with offensive and repugnant requests and comments that are an outrage to any civilized person.
> 4. Mrs. Cobb began experiencing retaliation and work problems, such as disciplinary action, upon rejecting the advances of Kerry Crawford and complaining of the same to her supervision.

(Statement of Facts at 7.)

In addition to the allegations contained in her complaint and Statement of Facts, plaintiff testified at deposition

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Materials presented on June 11, 1996, were stricken as not in compliance with the court's order, but the court accepted supplemental information submitted on June 14, 1996, when it was presented in slightly modified form, under oath of the plaintiff, on July 8, 1996. (See Order entered June 26, 1996, at 6-9.)

to fifteen incidents of alleged sexual harassment ranging over a period of time commencing in early 1990 and ending in September 1993, approximately one year before she terminated her employment with DuPont on September 15, 1994.

To summarize, plaintiff described four incidents involving conduct by defendant Knowles during a period commencing in February 1990 and ending in the spring of 1992. Only one incident involved a physical touching, that being in 1991 when Knowles held a "pager" or "beeper" against plaintiff's side.[3] An earlier incident purportedly occurred in 1990 at a Valentine's dance. Plaintiff alleges that, while looking at her, Knowles was "French kissing" his wife's ear.[4] Another time, in 1991,

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[3]Plaintiff testified about the beeper incident as follows:

> Dick Knowles came around to my desk and he said he had a new pager. He said it would either beep or vibrate but when he goes to church he puts it on the vibrating side of it so it wouldn't beep and cause distraction from the church service. And so then he excused himself. And then he came back and he got real close to me, and he said, "Here, hold my beeper." An'd he took his hand and put it on my side, and it started vibrating. And he said "How does that feel?"
>
> And I just handed back his vibrator, and he left. That was, I believe, was one time that I thought was out of line for Doctor Rnowles to do that.

(Deborah Cobb Dep. of Jan. 15, 1996, at 7.) Because Knowles was "the boss," she did not report the incident to any representative of DuPont until the taking of her deposition in this action on January 15, 1996. (Id. at 7-8.)

[4]At a Valentine's dance in 1990, while dancing with her husband, plaintiff "looked over" and saw Knowles "looking at me

Knowles allegedly made statements about the manner in which plaintiff was eating a hot dog.[5] The final incident plaintiff

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while he was French kissing Claire's ear, smiling." What she found offensive about the incident was:

> Just with him French kissing her ear and looking at me and smiling, it just kind of gave me the sense that he was pretty well sexual driven. I mean to me that was out of line for a plant manager being up there with his wife and French kissing the ear. I mean I don't believe -- I didn't see anyone else doing that.

(Deborah Cobb Dep. of Jan. 19, 1996, at 4-6.) Afterwards, everyone in the shift supervisor's office was "talking about Dick Knowles and Claire French kissing one another's ear." (Id. at 6.)

[5]The hot dog incident, which occurred when plaintiff and her husband and Knowles and his wife Claire attended an inauguration held for Damron Bradshaw when he became mayor in Chesapeake, is described by plaintiff as follows:

> And they served hot dogs. And you just put mustard on the hot dog.
>
> Well, Mr. Knowles and Claire came and sat at our table. And Claire was beside me, and then my husband and Doctor--Mr. Rnowles were across the table. Every time I would go to open my mouth to eat the hot dog Mr. Knowles would stand up and holler, yell at people and say, "Look, she's putting it in her mouth." He did that two or three different occasions.
>
> And finally I looked at Claire, and I said, "If you don't hit him and make him shut up, I'11 have my husband do it." And she told Dick that he was embarrassing me by doing that. And he did quit doing that.
>
> So then he would pass by the office and he would say-- Then during that time, he said I had mustard on my chin, and he kept doing like that (demonstrating) I didn't see that I had any mustard on my mouth. So then after that, he would come to the office and just point at his chin with his finger to say that I had something on my mouth.
>
> So that make me feel uncomfortable or just embarrassed me because he was just wanting everyone to watch

describes in her Statement of Facts as being a fact she relies on to demonstrate sexual harassment by Knowles occurred in the spring of 1992 when plaintiff alleges that rumors were circulating at the plant that she and Knowles were having a sexual relationship.[6]

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me as I opened my mouth up to eat my hot dog.

Q Why did that embarrass you?

A Because he stood up and wanted everyone to look at me. He'd say, "Look, she's putting it in her mouth."

Q What did that mean to you?

A It could have meant something sexual like how you open your mouth to put in a hot dog. By why he would want everyone to look at me while I was doing that I don't know. But he knew he was embarrassing me. My face was turning red.

(Deborah Cobb Dep. of Jan. 15, 1996, at 145-46.) She did not complain about the incident to anyone because Knowles was the plant manager and because "perhaps he was kidding. I mean you always want to give someone the benefit of the doubt. And his wife was sitting right there, and my husband was sitting there." (Id. at 146-47.) After that, "[he] just kept kidding me about having something on my chin every time he would see me." (Id. at 147.)

[6]Plaintiff testified at deposition:

Spring of 1992, I would say spring of 1992, there was a rumor going around the plant that Dick Knowles and myself were having a sexual relationship. That rumor really bothered me. And I happened to see Lester outside my door of my office, and I went out there and told him that there was a rumor going around about Dick and myself and I didn't appreciate the rumor. And he asked me what the rumor was. And I told him that it was a rumor that he and I--Dick Knowles and myself were having a relationship. And he told me not to worry about it, there were a lot of people that were jealous of me and Dick Knowles' relationship as being on a

Three incidents described by plaintiff in deposition involve Kerry Crawford and Damron Bradshaw, who are not defendants. Plaintiff alleged that Crawford called her at home in 1991 and made inappropriate comments of a sexual hature to her.[7]

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friendly basis, being friends, and Dick liked me a lot

. . . .

(Deborah Cobb Dep. of Jan. 15, 1996, at 48-49.)

[7]According to plaintiff, the call from Crawford was on the Monday of Thanksgiving week while her husband was out of town on a hunting trip. (Deborah Cobb Dep. of Jan. 15, 1996, at 5.) Crawford called at approximately 9:30 p.m. (Id.) His voice was slurred and he said he had been drinking. (Id.) Plaintiff further testified:

> And he asked me was I aware of what effect i had on men.
>
> And I said, "What do you mean?" Do you want me to be explicit about the language--
>
> Q Yes.
>
> A --that he used? And I said, "What do you mean?"
>
> He said, well, that I did have a lot of effect on men and that even Dick Knowles would like to f me. And I told him he was out of line, with him being drinking, he should not be talking that way with him being my supervisor.
>
> He said that if Little Ronnie wasn't home, who is my son, that he would invite me to come over and have a drink with him. Well, I hung up on him.

(Id. at 5-6.)

The next morning, Crawford called plaintiff at work and apologized for the phone call, saying "when he drinks, he gets rather wild and he was going through a divorce and that would I accept his apology. And I said, well, it did put himself in a spot, he shouldn't be calling me like that and saying those things to me." (Id. at 6.) She reported the incident to defendant Gore, who was the employee relations specialist. Gore told her that if she made an official complaint, Crawford would be fired. She did not want that to happen, but Gore said he would talk to Crawford. (Id.) Plaintiff also told defendant Price

Plaintiff complained about the call to defendant Gore, but did not want Crawford terminated. (Deborah Cobb Dep. of Jan. 15, 1996, at 6.) No other allegations are made with respect to Crawford. There are two incidents allegedly involving Bradshaw. According to plaintiff, the first incident occurred in 1991 when Bradshaw asked her for some underwear so he could smell it.[8] The second incident, which plaintiff says occurred in May 1993, involved an alleged request from Bradshaw for a sample of her pubic hair.[9]

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about the phone call from Crawford, but apparently not until approximately September of 1992. (Deborah Cobb Dep. of Mar. 22, 1996, at 105.)

[8]Defendants assert that plaintiff testified about the underwear incident with Bradshaw for the first time in her December 31, 1996, deposition when she was asked, in reference to the intentional infliction of emotional distress portion of her Statement of Facts, for the details about the "request to remove her panties," see, infra, page 34, quoting paragraph 1 of intentional infliction of emotional distress portion of Statement of Facts. The reference to the request to "remove her panties'l set forth in the Statement of Facts is clearly attributable to Bradshaw, although portions of the deposition which might provide more information about the incident are missing from the transcript of the December 31, 1996, deposition provided to the court. (DuPont Mot. for Summ. J., Ex. 21.)

[9]The May 1993 incident occurred while plaintiff was working overtime. (Deborah Cobb Dep. of Jan. 15, 1996, at 8, 10.) According to plaintiff, Damron Bradshaw "came to my desk and told me he wanted to see me back in the storeroom office." (Id. at 8.) Plaintiff described what happened next as follows:

> And so when I went back there, he commented on a white jumpsuit that I had on and how nice I looked. And I said, "Well, thank you." And he handed me a pair of scissors and he wanted to know if he could have a

The balance of the incidents described by plaintiff as forming the basis of her sexual harassment claim are directed to defendant Gore during a time period commencing in the spring of 1992 and ending in September 1993. The first incident was in the spring of 1992, when as noted above plaintiff told Gore there was a rumor going around the plant that she and defendant Knowles were having a relationship. (See Deborah Cobb Dep. of Jan. 15, 1996, at 48-49 (quoted, supra, pages 7-8, note 6).) Gore told her not to worry about it and then told her about another rumored affair in the office, concluding with the comment that "a stiff dick has no conscience." (Id. at 48.) Although upset by the comment, plaintiff did not feel threatened by it.

Plaintiff also alleges that between March and June of 1992, "[d]uring the investigation of my essay writing," Gore "on maybe five different occasions he would want to hug and kiss me. On one occasion, if I didn't turn my cheek, he would have kissed me on my lips." (Id. at 15-17.) The first couple of times he

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> sample of my public [sic] hair to see if it matched my blonde hair.

(Id.) When asked what she did, plaintiff answered: "I looked at him. I was really shocked that he would ask such a thing. I was embarrassed. I left. I didn't even stay and work overtime. It really scared me." (Id. at 8-9.) She did not report the incident to her supervisor, defendant Miceli, or anyone in supervision, but she did tell Pam Moorman, a good friend and co-worker about it. (Id.) She didn't tell anyone else because of all the other problems she was having at that time. (Id.) After that incident, plaintiff stayed away from Bradshaw and "avoided him as much as possible." (Id. at 12.)

hugged her, she "thought it was more like an embrace of I'm-going-to-help-you, more like a security type thing, like that he's going to help me and not more of a personal thing." (Id. at 21.) However, "the last I'd say three times I could tell it was getting more personal because he wanted to kiss me. And I did tell him that he should not be doing that, and I did pull away." (Id.) Gore responded "that he hugged and kissed all the women in the plant that he had contact with." (Id.) Although plaintiff says she did not find those incidents threatening, (Id. at 24), plaintiff also says that the "third" time Gore hugged her, it was different. (*Id.* at 25.) "[T]his time, he kind of hugged me a little closer to his body, and he would kiss me on my cheek. And I would pull away. And he could tell I was being uncomfortable with it. And he said, 'Well, Debbie, you know, I'm just trying to help you. Go ahead and sit down.' And I would sit down." (Ld. at 24.)

Plaintiff alleges in addition that in July 1992, Gore visited her at home. It was just after she had been subjected to "corrective action," apparently with respect to a dispute she was having with another female employee, and was required to write an essay. (Deborah Cobb Dep. of Jan. 15, 1996, at 13, 16-17.) Earlier in the day, there was a meeting about the situation, which took place in Knowles' office and was attended by plaintiff, Knowles, Gore and others. (Id.) After the meeting, Gore

called her in her office and said he wanted to talk with her about the meeting but not at the plant and not on the phone. (Id.) Gore suggested that they go to Knowles' apartment, to which he had a key, but plaintiff said she would not be comfortable doing that. (Id. at 13-14.) She suggested instead that he come to her house, "that my husband would be there for a while, but my son would be home and I would feel comfortable, if he wanted to talk to me about something so important, he could come to my house." (Id. at 14.)

Plaintiff's husband was at home at the beginning of Gore's visit, but then left, leaving Gore, plaintiff and her son. Gore was explaining to her why she was put on corrective action and was asking that she put everything behind her and forget about it. (Id.) At some point, plaintiff left the house to assist her son inflate a flat tire on his bicycle. (Id. at 15.) The following transpired:

> And before I left, [he] asked me if I had, if we had a rest room. And I said, "Well, yeah. " And he wanted to know how many bathrooms we had. And I said, "We have three, one downstairs and two upstairs." He said, well, he had to use the rest room. And I said, "Well, you can go to the one off the hallway."
>
> So when I went out and pumped up my son's bicycle tire, I was gone maybe ten minutes. He came out of the master bedroom with a grin on his face. And I asked him what was he doing. And he said, well, he had

to use the rest room. But he used the rest room off the master bedroom.

So when I was walking down the hallway, he looked at me and asked me would I raise up my T-shirt and show him my tits. And I asked him to leave. And he did leave at that time.

(Id. at 15.) Plaintiff told her husband about the incident, and then "had the least contact with [Gore] as she could." (Id. at

The next and final incident involving Gore is described by plaintiff as happening in September 1993 in the main office of the plant. (Deborah Cobb Dep. of Jan. 15, 1996, at 19.) Plaintiff testified at deposition that defendant Gore told her that he was having marital problems, asked whether she had been to the beach and said that "he would like to see some pictures of me in a bathing suit or if I had any pictures of me in a negligee. And I couldn't believe he was asking me those questions. And he said that he would show me a picture of his anatomy but he was so big and uncircumcised that it would scare me." (Id. at 20.) She responded to the incident by crying, and although she mentioned it to a co-worker friend, Suzanne Lackey, she did not report it to anyone in supervision. (Id.)

As is seen from the above summary of the facts relied on by plaintiff as forming the basis of her sexual harassment claim, none of the incidents make reference to defendants Price,

Rendinell or Miceli. Nor does plaintiff assert that she complained to Rendinell or Miceli about sexually harassing conduct by others, although it is conceded that, long after she had fully developed the matter with Gore about the Thanksgiving 1991 telephone call from Crawford, she told Price about it in September 1992. Thus, in their separate motions for summary judgment, defendants Price, Rendinell and Miceli assert that plaintiff has presented no evidence on which to base a sexual harassment claim against them and that they are entitled to summary judgment in their favor on that claim. In response, plaintiff identifies no incidents of sexual harassment undertaken by defendants Price, Rendinell or Miceli. Nor does she assert any basis for holding them liable for sexual harassment in which they did not personally participate.[10] The court accordingly

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[10]Counsel for plaintiff argues only that actions taken by Price, Rendinell and Miceli enabled Knowles and Gore to continue their retaliation against her. For example, it is stated that by the winter of 1992, Miceli had limited contact with plaintiff and withheld a monetary award she received, and that, in addition, when she complained to him about problems with a co-worker, she was subjected to corrective action. Rendinell, it is argued by counsel, advised plaintiff that he did not want to know anything about her problems with Knowles and was instrumental in failing to lighten her work load. Price, according to counsel's argument, was repeatedly advised of sexual misconduct at the plant, but did nothing.

The arguments of counsel, even if supported by evidence, do not form a basis for a claim of sexual harassment byPrice, Rendinell or Miceli. Nor are they sufficient to support a claim that these defendants are personally liable to plaintiff because they "aided or abetted an employer engaging in unlawful discriminatory practices." See Holstein v. Norandex, Inc., 461 S.E.2d 473 (W. Va. 1995)

finds that Price, Rendinell and Miceli are entitled to summary judgment in their favor with respect to plaintiff's Count III sexual harassment claim.

Turning to the motions filed by DuPont, Knowles and Gore with respect to plaintiff's Count III claim for sexual harassment, it is seen that plaintiff commenced this suit on July 28, 1995. In their separate motions, defendants DuPont and Knowles contend that insofar as plaintiff's sexual harassment claim is based on alleged incidents of sexual harassment which occurred more than two years before the suit was filed, the claim is barred by the two-year statute of limitations. As to the one incident which allegedly occurred within the limitations period, it does not involve Knowles and it is asserted by DuPont that it does not constitute severe and pervasive conduct. Furthermore, even considering all of plaintiff's sexual harassment allegations in the light most favorable to her, defendants DuPont and Knowles maintain that they do not rise to the level of severity and pervasiveness necessary to demonstrate a hostile work environment. In his separate motion, Gore similarly contends that he is entitled to summary judgment in his favor on plaintiff's sexual harassment claim because plaintiff has failed to demonstrate that any conduct attributable to him was subjectively severe enough to alter the conditions of plaintiff's employment and create an intolerable work environment.

In response to the motions, plaintiff states that her sexual harassment claim is timely under the continuing violation theory. Counsel also states that DuPont failed to act "as required by its own policies," thus enabling the individual defendants to continue "to injure plaintiff and adversely effect her work conditions"; that it is her "firm belief and personal knowledge that all defendants were acting in concert in what she termed was a 'conspiracy' to retaliate against her, primarily for Richard Knowles, and drive her from her job"; and that "plaintiff has consistently held that the attitude and behavior of her supervision, both sexual and nonsexual, was the direct result of Richard Knowles' attitude and behavior." (Pl.'s Am. Resp. DuPont Mot. Summ. J. at 19-20.) Plaintiff states, additionally, that she was prohibited "from proceeding with discovery designed to lead to relevant and probative evidence" of her "overall sexually-charged and severely hostile" work environment. (Id.)

The court first examines that aspect of the pending motions relating to plaintiff's sexual harassment claim that is based on the contention that the applicable statute of limitations bars the claim insofar as it is based on incidents occurring outside the limitations period, that being incidents occurring prior to July 28, 1993.

The West Virginia Supreme Court of Appeals has held that in cases filed in the circuit courts of the State of West

Virginia "involving allegations of discharge from employment related to claims of sexual harassment or discrimination, a two-year statute of limitations for personal injuries begins to run on the date of the last offensive contact, or threat of offensive contact, which precipitated the termination of employment." Harmon v. Higgins, 426 S.E.2d 344, 347 (W. Va. 1992). Offensive contacts occurring outside the limitations period are actionable only if plaintiff can demonstrate that they are part of a "continuous violation" of discrimination laws. Hurst v. St. Mary's Hosp. of Huntington, 867 F. Supp. 435, 437 (S.D.W.Va. 1994); see also Marshall v. Manville Sales Corp., 6 F.3d 229 (4th Cir. 1993) (finding that West Virginia would adopt the continuing violation doctrine when considering whether a discrimination action was timely brought under the West Virginia Human Rights Act). That is, the continuing violation theory, if applicable, operates in a manner that allows a plaintiff to recover for incidents even though the action was not filed until after expiration of the statute of limitations on those incidents. Garvev v. Dickinson College, 775 F. Supp. 788 (M.D. Pa. 1941)

The continuing violation theory has been applied in unlawful employment discrimination actions involving compensation disparity based on gender and age such that there is a "present" violation for as long as the disparity exists. Marshall, 6 F.3d at 231 (citing West Virginia Inst. of Tech. v. West Virginia

Human Rights Comm'n, 383 S.E.2d 490 (1989). "[T]hat is, each paycheck at the discriminatory rate is a separate link in a chain of violations." Id. (quoting West Virginia Inst. of Tech., 383 S.E.2d at 499). Stated more generally, the violation is continuing when it occurs "in a series of separate but related acts" throughout the course of employment. Jenkins v. Home Ins. Co., 635 F.2d 310, 312 (4th Cir. 1980). Consequently, "a disparate-treatment employment discrimination complaint based upon allegedly unlawful compensation disparity is timely brought if it is filed within the statutory period after such compensation disparity last occurred." Marshall, 6 F.3d at 231 (quoting West Virginia Inst. of Tech., 383 S.E.2d at 499); see also, Jenkins, 635 F.2d at 312. On the other hand, discrimination based on a refusal to hire "is not a continuous violation. It is a distinct act, and the statute of limitations runs from the date of refusal." Marshall, 6 F.3d at 231.

Although not developed in that context, the continuing violation theory has been applied in employment discrimination cases based on alleged racial or sexual harassment resulting in a hostile environment. Applicability of the continuous violation theory in the context of a sexual harassment case was succinctly summarized as follows in Garvev v. Dickinson College,. 775 F. Supp. 788 (M.D. Pa. 1991):

> [The continuous violation] theory allows a plaintiff to pursue a Title VII[11] claim for discriminatory conduct which began outside the limitations period if she can demonstrate that the conduct alleged is part of an on-going practice or pattern of discrimination effected by the employer. To rely on this theory, the plaintiff must prove that a violation occurred within the limitations period and that such violation is "reasonably related" to prior discriminatory acts alleged. Isolated or sporadic incidents of discrimination, even if intentional, are not sufficient to establish the recquisite pattern. She must also show that the contin-uing harassment was sustained and consisted of more than incidents of a trivial nature. Nor is it sufficient to show only that [she] suffered a loss within the limitations period as a result of prior discriminatory acts.

Id. at 801 (citations omitted) (quoted with approval and applied in Hurst, 867 F. Supp. at 438); see also Doe v. R.R. Donnelley & Sons Co., 42 F.3d 439, 446 (7th Cir. 199a,) (to establish a continuing violation in a sexual harassment hostile environment

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[11]Although the decision in Garvey addresses the continuous violation theory in the context of a sexual harassment claim under Title VII, 42 U.S.C. §2000e-2(a) (i), the West Virginia Supreme Court of Appeals has held that the discriminatory prac-tices prohibited by § 5-11-9 of the West Virginia Human Rights Act are identical to those prohibited by Title VII, Westmoreland Coal v. West Virginia Human Rights Comm'n, 382 S.E.2d 562, 566 (W. Va. 1989), and that § 5-11-9 is to be construed "to coincide with the prevailing federal application of Title VII unless there are variations in the statutory language that call for divergent applications or there are some other compelling reasons justify-ing a different result," Hanlon v. Chambers, 464 S.E.2d 741, 754 (W. Va. 1995) The court thus concludes that the federal theory of continuous violation as outlined in Garvey is properly applied to the facts of this case. See Marshall, 6 F.3d 229 (West Virginia would adopt the continuing violation doctrine when determining whether a discrimination action under the West Virginia Human Rights Act was timely brought).

case, "plaintiff must demonstrate that the defendant's acts were 'related closely enough to constitute a continuing violation' and not 'merely discrete, isolated, and completed acts which must be regarded as individual violations'") (quoting Berry v. Board of Supervisors of L.S.U., 715 F.2d 971, 981 (5th Cir. 1983)

Several courts have adopted the approach set forth by the Fifth Circuit Court of Appeals in Berry, 715 F.2d. at 981, in "determining whether prior incidents of discrimination constitute a continuing course of discrimination or whether they are discrete unrelated acts." Bailey v. West, 941 F. Supp. 1023, 1025 (D. Kan. 1996). In Berry, the Fifth Circuit Court of Appeals identifies three "relevant," but not "exhaustive," factors to be considered in determining whether the alleged discriminatory acts are related closely enough to constitute a continuing violation. Berry, 715 F.2d at 981. The first factor is subject matter; that is, whether "the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation." Id. The second factor is frequency, requiring an examination of whether the alleged acts are recurring or are more in the nature of isolated incidents. Id. The third, and perhaps most important factor, "is degree of permanence. Does the act have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse

consequences of the act is to be expected without being dependent on a continuing intent to discriminate?" Id.

Although the test enunciated in Berry was not developed in the context of a hostile work environment claim, it has been applied in cases of that nature. Indeed, it is noted that "Eh]ostile work environment and continuing violation claims have similar requirements of frequency or pervasiveness. There is a natural affinity between the two theories." West v. Philadelphia Elec. Co., 45 F.3d 744, 755 (3d Cir. 1995). The affinity results from the expectation that in order to demonstrate a hostile environment resulting from sexual or racial harassment which is pervasive and continues over time, the employee will need to show the continuing nature of the violations. id. (citing Jenson v Eveleth Taconite Co., 824 F. Supp. 847, 877 (D. Minn. 1993)) That is, "isolated or single incidents of harassment are insufficient to constitute a hostile environment. Accordingly, claims based on hostile environment sexual [or racial] harassment often straddle both sides of an artificial statutory cut-off date." Jenson, 824 F. Supp. at 877, quoted in West, 45 F.3d at 755. Nevertheless, the Third Circuit Court of Appeals "decline[d] to adopt a per se rule that a properly alleged hostile work environment claim also constitutes a continuing violation." West, 45 F.3d at 755.

In looking at subject matter, the first factor identified in Berry, the focus is on whether the discriminatory conduct was of the same type; i.e., whether all of the alleged violations involved discriminatory conduct in the form of sexual harassment. See West, 45 F.3d at 755 (all of the alleged acts involved the same subject matter where they all involved forms of racial harassment); Waltman v. International Paper Co., 875 F.2d 468, 475 (5th Cir. 1989) (all of the alleged acts involved the same subject matter where each incident involved sexual harassment) Frequency, the second factor, takes into consideration the consistency of the violations over time, as well as their duration. West, 45 F.3d at 755-56. "The fact that not all the incidents of harassment involved the same people does not show a lack of recurrence or frequency." Waltman, 875 F.2d at 475. The focus is on "recurrent acts of discrimination, not recurrent actors." Id. Nevertheless, the fact that alleged incidents involved perpetrators of differing identity may properly be considered in determining whether separate violations have a sufficiently close nexus as to permit She characterization of the complained-of conduct as continuing in nature, see R.R. Donnelley, 42 F.3d at 446; see also Koelsch v. Beltone Elecs Corp., 46 F.3d 705, 707 (7th Cir. 1995) (there must be a sufficient nexus between incidents perpetrated by differing individuals in order for them to be related closely enough to constitute a continuing violation). The fact that there are gaps

between specific incidents of harassment also does not necessarily demonstrate a lack of continuity. Waltman, 875 F.2d at 475-76. That is so because "[i]n a hostile environment, an individual feels constantly threatened even in the absence of constant harassment." Waltman, 875 F.2d at 476. Consequently, in evaluating the frequency, the court should review the pattern and frequency of the harassment and determine whether the evidence is such that it "could support a finding that the acts of harassment were sufficiently recurrent to create a continuously hostile environment." Waltman, 875 F.2d at 476.

The third factor, permanency, examines whether there was a discrete event, such as a lost job or a denied promotion," which triggered the duty of the plaintiff to assert the rights arising from the deprivation. West, 45 F.3d at 756. In that regard, it is noted that permanency is more readily apparent in cases involving the loss of a promotion than in cases alleging harassment. Waltman, 875 F.2d at 476. However, in looking at the permanency factor, the court should be mindful that "[t]he continuing violation doctrine is premised on the equitable notion that the statute of limitations should not begin to run until a reasonable person would be aware that his or her rights have been violated." Martin v. Nannie and the Newborns, Inc., 3 F.3d 1410, 1415 n.6 (10th Cir. 1993). Indeed, it is noted that the permanency prong of the Berry test serves to restrict the continuing

violation theory to "those situations underscored by its equitable foundation. That is, if an event or series of events should have alerted a reasonable person to act to assert his or her rights at the time of the violation, the victim cannot later rely on the continuing violation doctrine to overcome the statutory" limitations period. Martin, 3 F.3d at 1415 n.6 (citing Bell v. Chesapeake & Ohio Ry. Co., 929 F.2d 220, 223-25 (6th Cir. 1991)); see also, R.R. Donnelley, 42 F.3d at 446 (purpose of continuing violation theory is "to permit the inclusion of acts whose character as discriminatory acts was not apparent at the time they occurred")

Once sufficient evidence is proffered to demonstrate that a hostile environment is on-going, evidence of incidents outside the limitations period is admissible if "related to the overall hostile environment." West, 45 F.3d at 756. However, where, on review of all three of the Berry factors, sufficient facts are alleged to demonstrate a genuine issue of material fact regarding the existence of a continuing violation, summary judgment on that issue is inappropriate. Waltman, 875 F.2d at 476; see also, Martin, 3 F.3d at 1415-16 (evidence pertinent to Berry factors found sufficient to survive dismissal at summary judgment stage on statute of limitations issue, but issue could be re-evaluated by court in light of evidence as it develops at trial)

Inasmuch as application of the continuous violation theory requires, in the first instance, proof that a violation occurred within the limitations period, the court looks to the one incident described by plaintiff as occurring after July 28, 1993, that being the September 1993 picture exchange request by Gore. In evaluating whether that incident constitutes discriminatory conduct in the form of sexual harassment based on a hostile work environment,[12] the court is guided by the elements of that claim and by the applicable Legislative Rule of the West Virginia Human Rights Commission. To establish a claim of sexual harassment based on a hostile work environment, plaintiff must prove (1) that the conduct was unwelcome, (2) that it was based on plaintiff's sex, (3) that it was "sufficiently severe or pervasive to alter the ... [plaintiff's] conditions of employment and create an abusive work environment," and (4) that it was imputable on some factual basis to the employer. Hanlon 464 S.E.2d at 748-49 (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (citation omitted)) (internal quotes omitted) The conditions or privileges of employment may be abusive when the workplace is infected "by sexual barbs or innuendos, offensive touching, or dirty tricks aimed at the employee because of her gender." Hanlon, 464 S.E.2d at 749. The hostile environment

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[12]Plaintiff does not make a claim of quid pro quo sexual harassment, which occurs when an employer or its agent conditions employment or benefits on consent to participation in sex. See Hanlon, 464 S.E.2d at 749.

need not be created by a superior, but may be created by co-workers and subordinates as well. Id. at 750.

It is held that a determination of whether conduct is deemed severe or pervasive enough to alter the conditions of employment and create an abusive work environment requires an evaluation of the totality of the circumstances, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Harris, 510 U.S. at 23. In other words, "not all conduct that has sexual overtones can be characterized as the sort of sexual harassment that is forbidden by [TitleVII]." R.R. Donnelley, 42 F.3d at 443. Rather, the worker is afforded protection only "against conduct a reasonable person might find hostile or abusive." Id. at 444. In addition, "if the victim does not subjectively regard the environment as abusive, the conduct has not actually altered the victim's employment," and there is no violation, Id. (citing Harris, 510 U.S. at 23)

Consistent with the Title VII standards expressed by the United States Supreme Court in Harris, 510 U.S. at 23, regulations of the West Virginia Human Rights Commission direct that the totality of the circumstances, such as "the nature of the sexual advances and the context in which the alleged

incidents occurred" should be examined, with the determination of legality of a particular action to be made on a case-by-case basis. 77 W. Va. C.S.R. 4, § 2.3. More particularly, in determining "whether alleged sexual harassment in a particular case is sufficiently severe or pervasive," the Commission considers (1) whether unwelcome physical touching was involved; (2) whether there was verbal abuse of an offensive or threatening nature; (3) whether unwelcome and consistent sexual innuendo or physical contact was involved; and (4) the frequency of the unwelcome and offensive encounters. Id. at § 2.4.

Using the enumerated criteria to evaluate the picture exchange incident plaintiff attributes to Gore in September 1993, within the limitations period, it must be conceded that no unwelcome physical touching was involved. In addition, plaintiff did not describe the incident as being threatening in nature. Instead, the incident, as described by plaintiff, consists solely of an unwelcome verbal statement containing sexual innuendo, conduct which was no more than moderately offensive and which must be deemed less severe than an unwelcome physical touching. Plaintiff's failure to complain of the incident to anyone other than a friend and her continued employment for another year after the incident are also indicative of the lack of severity of the incident. The court thus concludes that the incident that allegedly occurred in September 1993 was not severe.

Similarly, the court is unable to find that plaintiff was subjected to pervasive sexual harassment within the limitations period, there being only the September 1993 picture exchange incident with Gore occurring within the two-year period just prior to commencement of this suit and that incident having occurred a full year before plaintiff terminated her employment. The court nevertheless treats the September 1993 incident as a violation occurring within the limitations period for purposes of determining whether the continuing violation theory is available to plaintiff. See Martin, 3 F.3d at 1415 n.5 (incidents occurring within the limitations period need not, standing alone, comprise a claim for hostile work environment in order to warrant examination of the continuing violation doctrine so long as there is one incident occurring within the statutory period)

Looking at the first factor identified by the Fifth Circuit Court of Appeals in Berry, it must be conceded that the incidents of alleged discrimination occurring outside the limitations period involve the same subject matter as the September 1993 picture exchange incident; that is, all of the incidents described by plaintiff allege sexual harassment. As to frequency, the second factor identified in Berry, it is seen that plaintiff alleges one incident of harassment in 1990, (Knowles at the Valentine dance); and four incidents of harassment in 1991 (the Knowles beeper incident, the Knowles hot dog incident, the

Bradshaw underwear request, and the Crawford phone call). In 1992, plaintiff complained to Gore about the rumors of her relationship with Knowles, which prompted the Gore "conscience" comment. In the spring of that same year, she was subjected to the allegedly unwelcome hugs and kisses of Gore and, in July, the Gore T-shirt incident at her home occurred. From July 1992 until May 1993, there were no incidents. In May 1993, the Bradshaw scissors incident allegedly took place. Then in September 1993, the Gore picture exchange request occurred.

Inasmuch as there were only two alleged incidents of sexual harassment during the fourteen-month period between July 1992 and September 1993, and none during the year to follow, it cannot be said that the incidents were occurring with frequency at that time. However, it is seen that beginning sometime in late 1991 and continuing through the July 1992 T-shirt incident at plaintiff's home, several incidents of alleged harassment took place. The frequency of the incidents which culminated in the July 1992 T-shirt occurrence suggests that some,-:.if not all, of the incidents up to that point may be related, even though they were not all committed by the same individual.

The court concludes, in any event, that consideration of the third Berry factor, permanency, precludes the inclusion of the September 1993 picture exchange incident involving Gore with the earlier incidents so as to constitute a continuing violation.

Plaintiff testified that "when I saw that Lester was starting to do this on a personal basis, that's when I called the Wilmington hotline for help." (Deborah Cobb Dep. of Jan. 15, 1996, at 16.) Plaintiff told "Cheryl Jennings from Wilmington that Lester on some occasions had gotten out of line with me." (Id.) She also says that she told Jennings about the T-shirt incident at her house and "that he did want to put his arm around me and hug me and try to kiss me." (Id. at 18-19.)

Plaintiff's own testimony thus demonstrates an acute awareness following the July 1992 T-shirt incident that she had a claim based on Gore's series of acts of sexual harassment culminating in that incident at her home, together with any of the earlier incidents involving other DuPont employees. She reported the Gore matter to Jennings and no further harassment is cited until the May 1993 scissors incident with Bradshaw, which similarly did not prompt any action by plaintiff. Indeed, even when plaintiff ultimately filed this lawsuit, she did not name Bradshaw as a defendant. Thereafter, there was the single incident in September 1993 when Gore allegedly made the request for an exchange of pictures, which was followed by another year of employment without any further incidents of harassment. Inasmuch as the undisputed evidence shows that plaintiff complained to Jennings about acts of harassment culminating in the 1992 T-shirt incident when Gore was at her home, no

reasonable jury could find that the incident failed to reasonably alert her to the need to assert rights based on that incident, and those that preceded it, within the two-year period next following. Similarly, when the May 1993 scissors incident with Bradshaw occurred, plaintiff knew that harassment had occurred, albeit as an isolated incident, and failed to take action within the limitations period.

The court thus concludes that plaintiff has failed to demonstrate that she is entitled to invoke the continuing viola-: tion theory in order to bring within the umbrella of her sexual harassment hostile environment claim incidents which allegedly occurred prior to July 28, 1993. See Koelsch, 46 F.3d at 706-08. Moreover, the one incident which occurred within the limitations period cannot support a finding of sufficiently severe and pervasive sexual harassment so as to create a hostile or abusive work environment.

Defendants are entitled to summary judgment in their favor with respect to plaintiff's Count III sexual harassment claim.

Inasmuch as plaintiff has failed to establish her hostile work environment sexual harassment claim, her claim that a hostile work environment culminated in her constructive discharge in September 1994 must also fail. See Schweitzer-Reschke

v. Avnet, Inc., 874 F. Supp. 1187, 1195 (D. Kan. 1995) (plaintiff cannot recover on her claim of constructive discharge resulting from hostile environment claim when she did not establish hostile environment). Furthermore, it is seen that plaintiff continued to work for a year after the last incident of alleged harassment and that she then terminated her employment in order to participate in an early retirement program offered by DuPont, (DuPont Mot. Summ. J., Ex. 2). In addition, two weeks after leaving employment, she applied for "total and permanent disability benefits" because it "has become very apparent to me since my leaving that I am not physically able to engage in any employment due to my present physical condition and greatly impaired health." (DuPont Mot. Summ. J., Ex. 10.) Given the length of time between the last alleged act of sexual harassment and plaintiff's decision to terminate her employment, no reasonable jury could conclude that she left her employment within a reasonable time after last being subjected to harassment, a necessary element of her constructive discharge claim. See Smith v. Bath Iron Works Corp., 943 F.2d 164, 167 (1st Cir. 199~1) (no constructive discharge when plaintiff did not leave employment until six months after last act of harassment); Jett v. Dallas Indep. School Dist., 798 F.2d 748, 755-56 (5th Cir. 1986) (no constructive discharge when approximately five months elapsed between last act of discrimination and termination of employment); Stafford v. State of Missouri, 835 F. Supp. 1136, (W.D. Mo. 1993)

(citing Smith, 943 F.2d at 167) (no constructive discharge when over four months elapsed between last incident of harassment and plaintiff's resignation and harassment prior to that time was only sporadic); Hogue v. MOS Inspection, Inc., 875 F. Supp. 714, 723-24 (D. Colo 1995) (no constructive discharge where Plaintiff remained on the job for five months after last discriminatory act). Furthermore, the necessity of demonstrating that her resignation was the result of a hostile work environment is undermined by the added showing that she left only when offered the benefit of an early retirement program and almost immediately thereafter claimed an inability to work. See Schweitzer-Reschke 874 F. Supp. at 1196 (plaintiff must be able to demonstrate that resignation from employment "was the result of illegal discriminatory conduct," not some other factor)

II.

Count V of the complaint, which is based on a claim of intentional infliction of emotional distress, identifies defendants Knowles, Gore, Elbert Price, Scott Rendinell and Lou P. Miceli as defendants who "deliberately and unlawfully set out to harass, humiliate and degrade the plaintiff to compel her to leave her employment and force her from her job." (Compl. at 16-17.) No specific factual allegations are contained in the

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

DEBORAH H. COBB,
Plaintiff

v. Civil Action No. 2:95-0743

E. I. DU PONT DE NEMOURS AND COMPANY, a Delaware corporation; RICHARD KNOWLES; ELBERT PRICE; LESTER GORE; SCOTT RENDINELL; LOU P. MICELI; PAMELA POKRZYWA; REUBEN W. HOLLAND, M.D.; and ROBERT L, LEADBETTER, M.D.,
Defendants

MEMORANDUM ORDER

This matter is before the court with respect to plaintiff's Count V ERISA claim, in which it is alleged that defendant E. I. duPont de Nemours and Company committed violations of sections 502(a) (1) (B) and 502(c) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C,A. §§ 1132(a) (1) (B) & 1132 (c).[1]

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[1]The complaint inadvertently contains two claims labeled "COUNT V." The first Count V is based on the tort of intentional infliction of emotional harm while the second Count V is characterized as an "ERISA VIOLATION" To avoid confusion, the court refers throughout to the ERISA claim as the Count V ERISA claim.

I.

In her complaint, filed on July 28, 1995, in the Circuit Court of Kanawha County, West Virginia, and removed to this court on August 25, 1995, plaintiff asserts in her Count V ERISA claim (1) that she was constructively discharged in order to prevent her attainment of disability and/or retirement benefits; (2) that she was wrongfully denied disability retirement benefits; and (3) that DuPont refused to provide her with copies of ERISA plan documents, all in violation of sections 502(a) (1)B) and 502(c) of ERISA.[2] Thereafter, on May 29, 1997, nearly five months after summary judgment motions were due, plaintiff filed a motion for summary judgment on the ERISA count. Inasmuch as the motion was untimely, the court declined to rule on it and set the ERISA claim for trial to the court on June 16, 1997.[3]

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[2]Under I 502(a) (1) (B), a participant in an employee welfare benefit plan may bring suit "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." I 1132(a) (1) (B). Section 502(c) allows for the imposition of a penalty against any plan administrator who fails or refuses to timely provide required information to a participant or beneficiary of the plan. I 1132(c)

[3]By Order entered on December 4, 1996, summary judgment motions were due by January 6, 1997. On that date, eight individual defendants filed motions for summary judgment with respect to all claims asserted against them and DuPont filed a motion for partial summary judgment, seeking judgment in its favor on all claims against it except for the Count V claim for ERISA violations. No summary judgment motion was filed by plaintiff. Subsequently, by memorandum orders entered on April 22 and 23, 1997, the court granted summary judgment in favor of the individual defendants on all claims against them. Summary judgment was

Reference to plaintiff's May 29, 1997, motion for summary judgment is nonetheless of assistance in understanding the basis of the ERISA claim as it evolved during the course of this litigation. It is noted in particular that the motion makes no mention of a claim of constructive discharge for the purpose of preventing plaintiff's attainment of benefits or of DuPont's alleged failure to provide plan information as required by section 502(c) of ERISA. However, the motion and supporting memorandum continue to reference a claim under section 502(a) (1) (B) based on the wrongful denial of benefits, asserting that plaintiff was denied benefits that were granted to other employees exhibiting the same medical conditions. (Pl.'s Mot. Summ. J. on ERISA, pp. 2-3 at ¶¶ 7, 11,) The supporting memorandum contends, in addition, that DuPont breached its fiduciary duty by failing to advise plaintiff prior to the date on which she elected to take early retirement that a "far better" program

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also granted in favor of DuPont on all claims addressed in its summary judgment motion except for a claim of fraudulent concealment, Consequently, after rulings were made on the timely filed motions for summary judgment, the only claims that remained were the fraudulent concealment and Count V ERISA claims against DuPont. At a hearing conducted on April 24, 1997, trial on those claims was continued, on plaintiff's motion, to June 16, 1997. (Ord. of Apr. 25, 1997.) Thereafter, plaintiff filed a motion for relief from the court's ruling on the fraudulent concealment claim. Although that motion remains pending, the court proceeded to trial on the ERISA claim on June 16 and 17, 1997.

would be offered in the near future. [4] (Pl.'s Mem. in Support at 10-11.)

At the commencement of trial on June 16, 1997, counsel for plaintiff confirmed that plaintiff asserts only two bases for finding a violation of rights protected under ERISA. One claim rests on the contention that at the time she elected to terminate her employment and participate in an early retirement program, DuPont violated ERISA by failing to apprise plaintiff of other retirement options to be made available in the near future, thereby depriving her of the opportunity to make an informed decision about delaying her retirement in exchange for the receipt of greater benefits. The other claim is based on the assertion that DuPont's denial of plaintiff's application for total and permanent disability benefits and incapability benefits was arbitrary and capricious because DuPont's administration of its benefit plans is inconsistent in the decision-making process. That is, inconsistent, according to plaintiff, in the sense that others with like conditions were granted total and permanent

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[4]A similar allegation was made in a Statement of Facts filed by plaintiff on July 8, 1996, in which she set forth the facts relied on to support the allegations in her complaint, (Statement of Facts, Docket No. 174 at 11), and in plaintiff's portion of the proposed pretrial order submitted in preparation for the March 12, 1997, pretrial conference.

disability and incapability retirement benefits that were denied to plaintiff.[5]

Both claims were tried before the court on June 16, 1997, and June 17, 1997, with the court restricting evidence on the wrongful denial of benefits claim to plaintiff's contention that the denial was improper because provisions of the pertinent employee welfare benefit plans have not been consistently applied. For the reasons announced in open court and more fully set forth below, at the conclusion of plaintiff's case, the court granted DuPont's motion for directed verdict on that portion of the Count V ERISA claim which related to DuPont's alleged failure to inform plaintiff about an early retirement option to be offered after plaintiff's elected termination date. As to plaintiff's section 502(a) (1) (B) claim based on the wrongful denial of benefits, having heard the evidence presented during the trial conducted on June 16 and 17, 1997, and having reviewed the administrative record and the parties' post-trial briefs on the issue, the court finds that plaintiff has failed to demonstrate that DuPont wrongfully denied her application for benefits.

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[5]On the basis of the representations of counsel and the absence of any reference to the claims since the complaint was filed, the court concludes that plaintiff has abandoned any alleged ERISA violation based on constructive discharge for the purpose of preventing her attainment of benefits and based on an asserted failure to provide the information required by § 502(c).

II.

Looking first at plaintiff's contention that DuPont failed to inform her that a more advantageous early retirement program would be offered soon after she made her September 15, 1994, election to terminate her employment as of November 30, 1994, the court makes the following findings of fact and conclusions of law based on the evidence, essentially undisputed, presented at trial.

1. During a 45-day period commencing on August 1, 1994, and ending on September 15, 1994, employees at DuPont's Belie Plant were offered the opportunity to participate in a career transition plan (CTP)/temporary pension system (TPS) program designed to obtain voluntary resignations by no later than November 30, 1994, in order to make a job available to another Belie Plant employee who would otherwise be terminated in a reduction-in-force operation.

2, The severance packages under the CTP and TPS programs were identical with respect to the cash amount to be paid (one month's "pay" for each two years of employment, with a maximum amount of twelve months' "pay"), and ancillary benefits (e.g., medical, dental and life insurance), including a $5,000 educational benefit. The only difference in the two programs was the manner in which the monetary payouts were handled. Payout

under the CTP was on a monthly basis, while the TPS program provided for a lump-sum payout which could be rolled over into a tax-deferred retirement program or taken as an annuity. (DuPont Trial Exs. 1 & 2.)

3. A similar CTP, without the TPS option, was previously offered in 1993. (Trial Tr. at 111-12.)

4. On September 15, 1994, plaintiff made an irrevocable application for participation in the program, (DuPont Trial Ex. 3), electing thereafter to receive a lump-sum payout in the approximate amount of $28,000, and choosing not to take advantage of the $5,000 educational benefit.

5. Plaintiff last reported to work on September 15, 1994, and in accordance with the CTP/TPS program, was terminated from the payroll on November 30, 1994.

6. The combined CTP/TPS program, with a termination date in March 1995, was offered again after plaintiff left employment. The CTP alone, with a termination date of November 1995, was also made available after plaintiff's termination.

On the basis of the above findings of fact, the court concludes that, as a matter of law, plaintiff cannot prevail on her claim that DuPont failed to inform her that a more advantageous early retirement program would be offered after her elected

termination date of November 30, 1994. A similar plan had been offered the previous year, putting plaintiff on notice that the opportunity might again present itself. Alternatively, there is no evidence before the court from which it could be found that DuPont knew prior to plaintiff's election date of September 15, 1994, that its reduction-in-force program would necessitate an additional effort to solicit voluntary resignations. More importantly, there is no showing that plaintiff was harmed by her lack of knowledge about a renewal of the CTP/TPS program after her election was made on September 15, 1994. There is no evidence of any difference between the options available to plaintiff in September 1994 and those offered to employees electing a 1995 termination date. Furthermore, insofar as plaintiff's counsel inferred that plaintiff could have simply delayed her early retirement and gained the inherent advantages associated with a longer employment period, the argument ignores plaintiff's contention in connection with her section 502(a) (1) (B) claim that, as of the date of her termination, she considered herself incapable of continuing employment.

In the absence of any evidence that she was harmed by DuPont's alleged failure to inform her about future early retirement options, plaintiff cannot prevail on her failure to inform claim, as the court so ruled in granting defendant's motion for directed verdict on that claim. (Tr. at 250.)

III.

Turning to plaintiff's claim that she was wrongfully denied benefits due under an employee welfare benefit plan maintained by DuPont and administered by its Board of Benefits and Pensions, it is agreed by the parties that judicial review of the Board's decision is to be made under the abuse of discretion standard.[6] Under that standard, the Board's decision is to be upheld if it is reasonable; that is, if it "is the result of a deliberate, principled reasoning process and if it is supported by substantial evidence." *Brogan v. Holland*, 105 F.3d 158, 161 (4th Cir. 1997) (quoting *Bernstein v. CapitalCare*, Inc., 70 F.3d 783, 787 (4th Cir. 1995)). In making that assessment, the court is to give due consideration, to the extent relevant, to (1) whether the administrator's interpretation of plan language is

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[6]The abuse of discretion standard applies when the plan grants the administrator discretionary authority to determine eligibility for benefits or to construe terms of the plan. *E.g.*, *Bernstein v. CapitalCare, Inc.*, 70 F.3d 783, 787 (4th Cir. 1995) (citing *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989)). Both plans here at issue vest administration of the plans in the Board of Benefits and Pensions appointed by DuPont and provide that "[t]he Board of Benefits and Pensions retains discretionary authority to determine eligibility for benefits hereunder and to construe the terms and conditions of the Plan." (Total and Permanent Disability Income Plan at 9, VIII.B.; Pension and Retirement Plan at 4, II.) Consequently, the abuse of discretion standard applies. *See Pokol v. E.I. Du Pont de Nemours and Co.*, 963 F. Supp. 1361, 1370-71 (D.N.J. 1997) (finding that a denial of benefits under DuPont's total and permanent disability benefit plan is to be determined under the arbitrary and capricious standard, which the court viewed as essentially the same as the abuse of discretion standard)

consistent with the goals of the plan; (2) whether it might render some language meaningless or internally inconsistent; (3) whether the challenged interpretation is at odds with the procedural and substantive requirements of ERISA; (4) whether the provisions at issue have been applied consistently; (5) whether the administrator's interpretation is contrary to clear language of the plan, id. at 161 (quoting de Nobel v. Vitro Corp., 885 F.2d 1180, 1188 (4th Cir. 1989)), (6) the scope of discretion conf erred; (7) the purpose of the provision of the plan in which discretion is conferred; (8) any external standard relevant to the exercise of discretion; (9) the administrator's motives; and (10) any conflict of interest under which the administrator operates in making the decision, *Haley v. Paul Revere Life Ins. Co.*, 77 F.3d 84, 89 (4th Cir. 1996) (citing *Restatement (Second) of Trusts* § 197 cmt. d (1957))

Plaintiff's first challenge to the Board's denial of her application for benefits focuses on the fourth consideration, it being her contention that the Board has not consistently applied the same standard in determining whether to grant disability benefits. As support for her position, plaintiff states that benefits were granted to other employees on the basis of disabilities similar to or even less severe than those she exhibited. (Pl.'s Br. in Supp. of J. at 3, 11-12.) Along those same lines, plaintiff suggests that it was an abuse of discretion

for the Board to require "objective medical evidence" of "permanent impairment of function," (id. at 19), and to apply that criteria in an inconsistent manner so as to "manipulate" the outcome of the application process, (Pl.'s Reply at 3). More particularly, plaintiff maintains that inasmuch as Judith Crowder was granted total and permanent disability benefits on the basis of chronic fatigue syndrome, plaintiff was likewise entitled to benefits on the basis of a diagnosis of chronic fatigue syndrome.

Plaintiff also maintains that DuPont discriminated against her in the application process in that other employees were given assistance that was denied to her and that would have resulted in an award of benefits. In that regard, she asserts that the Belie plant physician, Reuben Holland, M.D., advised other employees about the documentation required to obtain benefits, such as plant medical records and specially-worded physician reports,[7] (Pl.'s Br. in Supp. of J. at 3, 18.) Plaintiff claims, in addition, that she was treated differently than others because her entire plant medical records were not made a

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[7]It is further alleged in plaintiff's supporting brief that in addition to withholding assistance from her, DuPont "sabotag[ed] her application by concealment of her plant medical records." (Pl.'s Br. in Supp. of J. at 4.) The allegation is totally without support in the record as is the assertion, Pl.'s Reply at 1), that plaintiff was completely denied discovery pertaining to awards of medical disability benefits.

part of her benefit application package,[8] because she was not given a "neurocognitive examination" by Dr. Holland, because Dr. Xolland did not ask her questions about chronic fatigue syndrome from a prepared list, and because no one consulted with her supervisors about difficulties she had performing her work, as was done for Crowder. (*Id.* at 7-8, 13-14.) In addition, she seemingly contends that she was discriminated against because no one prepared a description of her job for use by her treating physician in assessing her ability to perform that work or advised her treating physician about the wording that should be used in order for her to qualify for benefits, as was done for David Hager. (*Id.* at 8-10, 13, 18-19.)

By way of further support for the contention that she was unfairly treated, plaintiff interprets section VI.A.1. of the Total and Permanent Disability Income Plan as making it "clear that it is the Company who directs, advises and inquires in order to obtain the necessary medical evidence to determine eligibility

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[8]Plaintiff argues at length that her plant medical records demonstrate that she suffered from chronic fatigue syndrome and other disabling conditions, (Pl.'s Br. in Supp. of J. at 7-8, 10, 15, 19) and that to the extent those records were not reviewed, the decision to deny her application for benefits was made "on far less than a whole record," (*id.* at 15; Pl.'s Reply at 2), and thus, in an arbitrary and capricious manner, (Pl.'s Br. in Supp. of J. at 17-18). However, it is noted that no specific plant medical records are referenced, just as no particular materials were called to the Board's attention when counsel reviewed plaintiff's entire plant medical record in connection with her appeal. *See, infra*, page 34.

for total and permanent disability." (*Id.* at 11) (emphasis in original). (See also id. at 13, stating that it was "the absolute duty and sole responsibility" of Dr. Ramirez to inquire of plaintiff's doctors, Dr. Romano or Dr. Cheney, as to whether the Center for Disease Control (CDC) criteria for chronic fatigue syndrome was met because "[t]he plan is explicit in that The Company is charged with gathering medical reports, making inquiry, and giving the employee any and all needed guidance and direction . .") (emphasis in original); (*cf. id.* at 14, stating that it was Dr. Holland's "responsibility by the Plan language," to discuss plaintiff's complaints "of shortness of breath, chronic bronchitis and cough with excessive phlegm" with her supervisors and "construct an honest and accurate assessment of the known effects of dust and fumes on a chronic asthmatic.")

As a final point, the court gives a broad reading to generalized statements in plaintiff's supporting memoranda and treats them as an assertion that the Board's denial of benefits was an abuse of discretion because it is not supported by substantial evidence in the materials presented to it for consideration,[9] In particular, the court examines the assertions that

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[9]The generalized statements referred to by the court include the statement that plaintiff's diagnoses of asthma, hypertension and acute chronic fatigue syndrome "are amply documented in the plaintiff's submitted reports as contained in the administrative file to which this Court has limited all consideration," (Pl.'s Br. in Supp. of J. at 12), and the references to symptoms and diagnosis contained in the reports of Dr. Romano, Dr. Cheney, and

plaintiff submitted objective medical evidence in the form of an "abnormal EEG," "an x-ray with the accentuated markings consistent with asthma," and "a bronchial methacholine challenge test" sufficient to demonstrate her entitlement to benefits. (Pl.'s Reply at 3-4.)

In determining whether the Board's denial of benefits was an abuse of discretion, the court first examines the pertinent language in the Pension and Retirement Plan, (hereinafter, Pension Plan). The purpose of the Pension Plan is "to provide for the retirement of employees and, under the conditions set forth below, to provide an employee who is retired or otherwise terminated with pension rights that take into account the length of his service and the pay he received during his employment with the Company." (Pension Plan at 4, § I.) In furtherance of that goal, the Pension Plan contains a provision for an incapability retirement pension. The eligibility requirement for an incapability retirement pension is stated as follows:

> An employee may be retired by the Company if the Board of Benefits and Pensions finds that he has become, for any reason, permanently incapable of performing the duties of his

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Dr. Preston, and in the methacholine challenge result submitted by Dr. Rasmussen, (*id.* at 16-17, 19), which are a part of the administrative record.

> position with the degree of efficiency required by the Company, and he has at least 15 years of service.

(*Id.* at 7, § IV.C.(1).)

By comparison, the stated purpose of the Total and Permanent Disability Income Plan, (hereinafter, the T&P Plan), is "to protect eligible employees against substantial loss of earnings in the event of total and permanent disability resulting from injury or disease by supplementing benefits payable under other Company and government-sponsored programs." (T&P Plan at 2, §I.) An employee is eligible for benefits under the T&P Plan if, inter alia, "he becomes disabled after the date he completes one year of service and his service is terminated because of total and permanent disability on or after the effective date." (*Id.* at 4, § III.A.) He is considered "totally and permanently disabled" if the Board finds that he "is totally disabled by injuries or disease and presumably will be totally and permanently prevented from pursuing any gainful occupation." (*Id* . at 3, § II,E.) The determination is to be made "on the basis of his condition immediately prior to his termination of service with the Company and an employee who becomes totally and permanently disabled after termination of service with the Company will not qualify for benefits under this Plan." (*Id.*)

Unlike the Pension Plan, the T&P Plan contains a section addressing the application for benefits. It provides in pertinent part:

> A. Application for benefits under this Plan shall be submitted to the Board of Benefits and Pensions in such form as the Board may prescribe.
>
> 1. Satisfactory medical evidence must be provided on which the Board may base a finding that an individual is totally and permanently disabled. The Company may require, in its discretion, a report from the individual's physician and other appropriate information and documentation as part of the basis for determining total and permanent disability. The individual shall authorize release of any medical records or other material concerning his disability which the Company may request. In addition, he shall permit such examinations and inquiries by the Company's Medical Division as in its judgment may be necessary in order to ascertain his condition, and he will be expected to cooperate with the Medical Division in following such advice and directions as may be given.
>
> B, If application for benefits under this Plan is denied in whole or in part, the Board of Benefits and Pensions shall furnish written notice of such denial. A written request for review of the denial of the claim may then be submitted to the Board and shall document the reason the individual believes the original finding by the Board was incorrect. If the individual wishes to

> submit additional medical evidence of his disability, such evidence shall be furnished at his expense. The Board will reply in writing to each such request for review.

(T&P Plan at 8, § VI.A.1. & B.

Under both plans, the discretion to determine eligibility for benefits is vested in the Board, which is also authorized to "adopt such rules, or delegate to one or more persons its authority to make initial determinations, as it may deem necessary for the proper administration of the Plan." (*Id.* at 9, VIII.B.; Pension Plan at 4, B II.)

On September 15, 1994, plaintiff, having more than fifteen years of service with DuPont, applied for early retirement. Although not terminated from the payroll until November 30, 1994, her last day at work was September 15, 1994. In the interim, on September 30, 1994, she wrote to Elbert Price, asking that the letter be considered "as an application for total and permanent disability benefits." (Admin. R. at 6.)[10] With respect to her claimed disabilities and their effect on her ability to perform work, the letter states:

> It has become very apparent to me since my leaving that I am not physically able to engage in any employment due to my

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[10]All references to the administrative record are to the record filed this date by separate order.

present physical condition and greatly impaired health. At present, I suffer from acute respiratory problems which have been diagnosed as asthma. I also have recently been informed that I am suffering from stomach ulcers which is still being medically evaluated as to the severity of this condition. Additionally, I have been hypertensive for some time. I have continually suffered from chronic, recurrent and painful shingles and hives.

These conditions are very serious and debilitating and the work-related problems under which I have been functioning has greatly exacerbated these conditions to the point where I am unable to seek out and maintain gainful employment. I also believe that sufficient evidence exists in my medical file at the plant to support my claim for total and permanent disability benefits.

(Admin. R. at 6.)

On November 14, 1994, plaintiff's application was forwarded to DuPont's Benefits Delivery Section in Wilmington, Delaware. (Admin. R. at 2.) The cover letter contained a description of the job duties plaintiff performed as a shipping

clerk prior to her termination[11] and asked for a determination of her eligibility for incapability pension and total and permanent disability income plan benefits. (*Id.*) The cover letter stated that a medical evaluation report and "related medical documents" were attached. (*Id.*) Additional medical information in the form of a medical report from Dr. Romano, of Wheeling, West Virginia, was forwarded to Wilmington on November 16, 1994. (Admin. R. at 27-29.) The report was dated July 28, 1994 and bore the notation that it was revised on November 9, 1994. (Id.)

By letter dated December 5, 1994, plaintiff's application for incapability retirement pension and for total and permanent disability income plan benefits was denied because "[i]t was determined that you are not permanently incapable of performing the duties of available work with the degree of efficiency required by the Company, as noted in Section IV C (1) of the Pension and Retirement Plan, a copy of which is attached."

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[11]The job requirements were described as follows:

> A Shipping Clerk is required to complete complex shipping forms (written and typed), use computers extensively, and follow (and interpret) detailed complex shipping procedures and occasionally travel to participate in training workshops. In addition, they interface with plant employees and outside people and must help resolve problems quickly between the producing departments, customers, and the shippers.

(Admin. R. at 2.)

(Admin. R. at 32.) The letter advised plaintiff of her right to appeal within sixty days and explained:

> In order for your appeal to be successful, you must provide additional objective evidence that will indicate a total impairment of function. Examples of objective evidence are significant or positive results of tests such as MRI, x-ray reports and complete medical evaluations. Opinions of healthcare providers are not sufficient without objective medical evidence to support such opinions. Any information that you would like to have reviewed may be forwarded to us through Elbert Price.[12]

(*Id.* at 32-33.)

The letter also notified plaintiff that the medical information considered in making the denial determination consisted of:

1) Medical Record Form from Dr. L. Rasmussen dated 11/1/94;
2) Medical Report by Dr. T. J. Romano dated 7/28/94 and revised on 11/9/94;
3) Medical Report by Ashton Care Center dated 3/18/92;
4) Progress Notes dated from 8/17/93, 9/19/94;
5) Laboratory Report dated 12/17/93;
6) Medical Evaluation Report by Dr. R. W. Holland, Jr. dated 10/19/94.

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[12]At trial, Dr. Ramirez, a member of the Board, testified that an employee aggrieved by the Board's initial determination is informed of the medical records reviewed in reaching a decision, is advised of the right to appeal the decision, and is notified of the necessity of providing objective medical evidence of permanent impairment in order to be eligible for benefits. (Tr. at 73-74.)

(*Id.* at 32.)

By letter dated January 4, 1995, counsel for plaintiff wrote to Price, requesting an appeal of the decision denying her application for benefits. (Admin. R. at 34-36.) The letter takes issue with the determination, stating that plant medical records contain sufficient objective medical evidence of plaintiff's inability to maintain employment and of her unemployability if she tried to work because the "cumulative effects of asthma, connective tissue disease, autoimmune disorders such as documented arthralgias, myalgias and repeated episodes of severe and painful shingles, and hypertension would leave any individual capable [sic] of gainful employment." (*Id.* at 34-35,) The letter concludes by stating that the Board's denial letter will be forwarded to plaintiff's consulting and treating physicians in order that they might respond to the request for "more objective medical evidence." (Id. at 36.) In a response dated January 11, 1995, counsel was advised that plaintiff's case would be held in abeyance pending the receipt of additional information, after which the Board would review the "information previously considered as well as any additional information submitted." (Admin, R. at 39.)

Thereafter, on June 16, 1995, counsel wrote to Benefits Delivery in Wilmington, stating, *inter alia*:

> After a very extensive review of Mrs. Cobb's medical file as maintained at the Belie Plant, consultation with her treating physicians, and information and facts regarding disability and incapability pension benefits as recently granted to some of Mrs. Cobb's co-workers, I cannot see the medical necessity or wisdom in submitting further medical evidence regarding physical illnesses and disabilities that are already well established in your own company's files on this former employee.
>
> . . . .
>
> It is very well-known to you that Mrs. Cobb suffers from asthma, hypertension, fibromyalgia and recurrent severe herpetic lesions.
>
> . . . .
>
> Therefore, I respectfully request that your board review the medical records as maintained by the Belie Plant medical staff, as well as the additional medical records which were submitted by Mrs. Cobb when she requested a disability retirement. I have taken the liberty of submitting some current medical reports which will support the above information already in your possession.

(Admin. R. at 40-41.)

Receipt of the letter and of additional medical information was acknowledged by letter from the Board dated June 22, 1995, (Admin. R. at 49.) The appeal was denied by letter dated August 10, 1995, in which it was stated: "The Board noted that you have a diagnosis of asthma. However, the medical evidence submitted does not support a conclusion that you were permanently

incapable of performing the duties of a Shipping Clerk with the degree of efficiency required by the Company at the time of your termination. " (Admin. R. at 55.) The medical information reviewed was identified as that listed in the denial letter of December 5, 1994,[13] and the following new information:[14]

1. Progress Note, Dr. M. Kostenko, dated 2/9/95;
2. Mineral Levels Report, dated 3/6/95;
3. X-Ray Report, Southern West Virginia Clinic, dated
4. Blood Analysis, Southern West Virginia Clinic, dated 11/1/94.

(*Id.*) The letter also advised that the Board's review "completes your appeal rights within DuPont as required by ERISA." (*Id.*)

Over a year later, on October 28, 1996, plaintiff's counsel nevertheless again wrote to Benefits Delivery requesting reconsideration of plaintiff's application for benefits on the basis of "asthma, chronic fatigue syndrome, and a concurrent

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[13]The letter of August 10, 1995, makes reference to an earlier letter of December 5, 1995, but it is apparent that the reference was intended to be to the denial letter dated December 5, 1994. See, supra, pages 19-20.

[14]Dr. Ramirez testified at trial that if an appeal is pursued, he reviews any additional information presented and discusses it with the plant medical department, (Tr. at 73.) If he determines that the medical information is not sufficient to warrant an award of benefits, he presents the case to the Board for its review of the entire medical record. (Tr. at 73-74.) The Board's decision is communicated to the applicant in writing, together with a list of all the medical information reviewed. (Tr. at 74-75.)

immune system dysfunction disorder ... complicated by a hypertensive condition which currently requires continual medication."[15] (Admin. R. at 56.) Additional medical reports were provided consisting of (1) medical reports from Paul R. Cheney, M.D., Ph.D., of Charlotte, North Carolina; (2) a report from Myra Preston, Ph.D., of Charlotte, North Carolina, regarding plaintiff's "computerized EEG (brain map);" and (3) methacholine, challenge testing results from Dr. Rasmussen of Beckley, West Virginia. (Id.) The additional medical information was reviewed by the Board's medical director along with the medical information earlier presented and by letter dated May 13, 1997, the Board advised plaintiff's attorney that in the medical director's opinion, "the new medical information does not provide objective medical information which indicates that Ms. Cobb had a permanent impairment of function at the time of her termination on November 30, 1994, Therefore, the determination that Ms. Cobb is not

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[15]The October 28, 1996, request for reconsideration is the first time plaintiff states that she suffers from chronic fatigue syndrome. Attached to that letter is the report from Paul R. Cheney, M.D., Ph.D., dated September 19, 1996, giving a final assessment of chronic fatigue syndrome. (Admin. R. at 63.) Plaintiff's earlier appeal of June 16, 1995, forwarded the February 2, 1995, progress note of Dr, Kostenko, an osteopath of Beckley, West Virginia. (Admin. R. at 40-41, 49.) In the medical history portion of the progress note, Dr, Kostenko makes reference to Dr. Romano's report of July 28, 1994 (wherein Dr. Romano states that plaintiff suffers, inter alia, from "chronic fatigue") and states that `patient has apparently a fibromyalgia Chronic Fatigue Syndrome." (Id. At 42.) The appeal letter nevertheless makes no mention of chronic fatigue syndrome as a disabling condition warranting an award of benefits. (Admin. R. at 40-41.)

eligible for Total and Permanent Disability Benefits has not changed." (Admin. R. at 94.)

IV.

Inasmuch as a primary focus of plaintiff's challenge to her denial of benefits is her claim of inconsistent application of plan provisions, including the requirement of objective medical evidence of permanent impairment of function, the court first considers whether the Board's denial of benefits to plaintiff was an abuse of discretion because of that requirement and because Judith Crowder, who suffered from chronic fatigue syndrome, a disability claimed by plaintiff, was granted benefits while plaintiff was not.

It is seen from a review of the Pension Plan and T&P Plan that no mention is made of the requirement of objective medical evidence. However, both plans grant the Board discretion to determine eligibility for benefits and to adopt rules and delegate authority for making initial determinations. Supra, page 17, In that regard, the court finds on the basis of the evidence presented at trial that the Board delegated to one of its members, Benjamin Ramirez, M.D., an associate medical director for DuPont, the duty of reviewing all benefit applications and the authority to make the initial determination of whether to

grant or deny benefits. In performing those duties, Dr. Ramirez employed a standard which required objective medical evidence of permanent impairment of mental or physical function as of the date of termination from employment, with "permanent" meaning a condition that lasts more than six months. (Tr. at 36, 51-52, 62, 64-65, 68-69, 72-73, 83, 87.) He described examples of objective medical evidence as including physical examination findings, (Tr. at 37, 87), EEG reports, (Tr. at 41, 87), test results, medical assessments, psychiatric reports, and laboratory analyses, (Tr. at 72-73, 87). According to Dr. Ramirez, nonmedical factors are not taken into consideration in his decision-making process. (Tr. at 65.)

Plaintiff does not articulate how utilization of the objective medical evidence standard constitutes an abuse of discretion except by citation to the case of *Mitchell v. Eastman Kodak Co.*, 113 F.3d 433 (3d Cir. 1997). In *Mitchell*, the Third Circuit Court of Appeals held that it was impermissible for the administrator of an ERISA plan to require objective medical evidence of chronic fatigue syndrome, the condition Mitchell relied on to show that he was disabled. *Id.* at 442-43. In reaching its decision the court noted that the Kodak Plan documents did not require "clinical evidence of the etiology of the 'condition'" that rendered Mitchell disabled, but only a showing of disability on the pertinent date. *Id.* at 443. In

addition, the court concluded that the requirement was not appropriate in the context of chronic fatigue syndrome. *Id.* The court further explained:

> Moreover, it was impermissible for the Administrator to imply an additional "clinical evidence of etiology" requirement not specified in the Plan document in the context of CFS. It is now widely recognized in the medical and legal communities that "there is no 'dipstick' laboratory test for chronic fatigue syndrome." Because the disease, although universally recognized as a severe disability, has no known etiology, it would defeat the legitimate expectations of participants in the Kodak Plan to require those with CFS to make a showing of clinical evidence of such etiology as a condition of eligibility for LTD benefits. Thus, it was arbitrary and capricious for the Administrator to deny Mitchell benefits because of a lack of such clinical evidence of the etiology of his CFS.

Id. (citations omitted)

Mitchell is distinguishable in critical respects. Although the Kodak Plan gave the administrator discretion to make eligibility determinations, *id*, at 438, there is no indication that it also contained a provision similar to that in the DuPont plans which authorized the adoption of rules deemed necessary for proper administration of the plans. Nor does it appear that the Kodak Plan required that the applicant provide "[s]atisfactory medical evidence" of total and permanent disability, as is required under the DuPont T&P Plan. More importantly, Mitchell,

unlike plaintiff, presented medical records showing that he began suffering chronic fatigue syndrome symptoms prior to his termination and a subsequent letter which explained how those then misunderstood symptoms rendered him totally disabled from gainful work at the time his employment was terminated. *Id.* at 441-42. Furthermore, plaintiff in this case has not been required to offer clinical evidence of the etiology or cause of chronic fatigue syndrome but simply to furnish objective medical evidence supporting her claim. The CDC criteria includes such evidence.[16]

The court accordingly is not persuaded on the reasoning of *Mitchell* that utilization of an objective medical evidence standard, standing alone, constitutes an abuse of discretion. As was noted by the New Jersey district court in *Pokol v. E.I. du*

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[16]Dr. Ramirez testified 'that to support a finding of chronic fatigue syndrome using CDC criteria, a person must be diagnosed by a qualified doctor as exhibiting major criteria and minor criteria. (Tr. at 45, 66,) The major criteria are fatigue severe enough to impair a person 50% in his daily activity, which lasts more than six months, and for which there is an absence of illness, such as cancer, depression or psychiatric problems, that would explain the fatigue. (Tr. at 46, 66, 92-93.) The minor criteria consists of eleven symptoms, including fever, adenopathy (swollen glands), pharyngitis (inflammation of the pharynx, the passageway which connects the mouth and the back opening of the nose with the esophagus), and achy joints. (Tr. at 45-46, 93,) A person exhibiting the major criteria and six symptoms of the minor criteria, plus two physical examination findings, or, if no physical examination findings, then symptoms of eight of the minor criteria, "could be considered a case of chronic fatigue syndrome." (Tr. at 46, 92, 94.) The 1994 and 1996 reports plaintiff submitted from Dr. Rasmussen in support of her application for benefits did not mention chronic fatigue syndrome and, instead, showed an absence of two minor criteria: fever and adenopathy. (Tr. at 44-45, 66-67.)

Pont de Nemours and Co., 963 F. Supp. 1361 (D.N.J. 1997), in facing a similar challenge to DuPont's objective medical evidence standard: "Interpreting the language 'satisfactory medical evidence' to include 'objective medical evidence' is neither irrational nor unreasonable." *Id.* at 1372. It is apparent that this inclusory standard is the standard that Dr. Ramirez was following when he sought confirmation of plaintiff's disabling condition in the form of objective medical evidence.

Inasmuch as plaintiff presented no evidence to contradict the testimony of Dr. Ramirez that he employed an objective medical evidence standard in his review of all benefit applications, see also id. at 1372 (stating that DuPont consistently interprets its T6cP Plan to require objective medical evidence of total and permanent disability at the point immediately prior to termination from employment), the court is also unable to find an abuse of discretion based on an alleged inconsistency in application of that standard.

Plaintiff's reliance on the grant of benefits to Crowder similarly fails to demonstrate an abuse of discretion based on inconsistent application of plan provisions. At trial, Dr. Ramirez testified that if an applicant submits objective evidence that the criteria established by the Center for Disease Control for a finding of chronic fatigue syndrome are met and it is determined that there is an impairment of function which

appears to be permanent -- that is, it lasted more than six months -- chronic fatigue syndrome can be the basis for an award of benefits. (Tr. at 38, 65, 86.) Testimony was also elicited from Judith Crowder, a former DuPont employee who receives total and permanent disability benefits. On direct examination, Crowder testified that in her application for benefits, she stated that she suffered from chronic fatigue and immune dysfunction syndrome. (Tr. at 171.) However, cross examination disclosed that she also suffered from osteoarthritis of the cervical spine, obesity, chronic pain, anxiety and depression, sleep disorder, and gastritis with esophageal reflux. (Tr. at 176-77.)

In discussing the factor of inconsistency as it impacts the court's consideration of whether a denial of benefits was an abuse of discretion, attention must be given to factual distinctions between situations and surrounding circumstances, See *Lockhart v. UMWA 1974 Pension Trust*, 5 F.3d 74, 80 (4th Cir. 1993). Where the facts are distinguishable, it is not an abuse of discretion to decide the question of eligibility differently. Id . Here, there is no basis on which the court could find that plaintiff's alleged disabilities are factually indistinguishable from the disabilities claimed by Crowder and accepted by the Board as warranting an award of temporary and permanent disability benefits. As Crowder conceded at trial, at the time that she applied for benefits, she had a diagnosis not only of

chronic fatigue and immune dysfunction syndrome, but also of several other disabling conditions not claimed by plaintiff. Moreover, Crowder could only speculate that chronic fatigue syndrome was the "major consideration" in the decision to grant her application for benefits.[17] (Tr. at 177.) The medical conditions claimed by plaintiff being factually different from those presented by Crowder and there being nothing before the court that evidences the Board's decision-making process in the Crowder case, the court is unable to find that the Board decided plaintiff's eligibility for benefits in a manner that was inconsistent with its decision on Crowder's application.[18]

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[17]Dr. Ramirez testified that another employee, Rick Shaffer, may have been granted disability benefits on the basis of a diagnosis of chronic fatigue syndrome. (Tr. at 61.) However, inasmuch as no other information is presented with respect to his application, it cannot be said that his situation is factually indistinguishable from that of plaintiff.

[18]Plaintiff contends that her ability to demonstrate inconsistency in the application of plan provisions is hampered because she was denied discovery in that area. With regard to that contention, it is seen that in its response to plaintiff's first set of interrogatories and second request for production, served on October 30, 1996, DuPont states: "Since 1991, twenty-three Employees at the Belle plant have received either total and permanent disability benefits or an incapability pension from DuPont." The diagnosed medical conditions they suffered include 'lung disease" and "chronic fatigue syndrome." (Pl.'s Mot. Summ. J. on ERISA claim, Docket No. 472, Ex. 9, DuPont Reap. at 10-11.)

The record also shows that plaintiff subpoenaed Elbert Price on January 31, 1996, to appear at deposition on February 6, 1996, and to bring with him "[t]he complete file regarding any and all awards of total and permanent disability from January 1, 1993, through December 31, 1994, inclusive." (Docket No. 77.) DuPont objected to the deposition on the grounds, *inter alia*, that insufficient notice was given and the discovery deadline was

about to expire. Plaintiff then filed a motion for contempt on March 1, 1996, (Docket No. 103), and on March 8, 1996, another notice to take the deposition of Price, in which plaintiff again sought, inter alia: "The complete employee files pertaining to any and all awards of total and permanent disability at the Belie Plant from January 1, 1993, through December 31, 1994, inclusive." (Docket Entry No. 111.)

The motion was heard by the magistrate judge on March 11, 1996, at which time DuPont opposed producing the requested documents on the ground that they "are medical records Those would be confidential records that we would not produce and would state that those are not relevant." (Mar. 11, 1996, Hr'g Tr., Docket Entry No. 130, at 16.) An order reflecting the rulings of the magistrate judge was entered on March 22, 1996. The motion for contempt was denied and with respect to the Price deposition, the order states only that the court finds that the requests to Price "are overly broad and seek information irrelevant to this action." (Mar. 22, 1996, Ord., Docket No. 131, at 3, 6.)

Plaintiff appealed. Insofar as the materials sought in the Price subpoena and deposition notice are concerned, the appeal states that Price was "exempted" from honoring the subpoenas and from producing any information whatsoever; that Price was "shielded" from full disclosure of DuPont's practices and procedures; and that "[unequal handling of employee benefits is certainly a clearly defined area of dispute in this case." (Apr. 2, 1996, Appeal, Docket Entry No. 141, at 3, 9.) Nonetheless, most of the appeal addresses other matters and in the final paragraph, where plaintiff stated the relief requested on appeal, there is no mention of Price or the materials sought through him except for the request that he be made to appear for deposition. (Id. at 11,)

When plaintiff's appeal was heard on May 31, 1996, the court did not raise the issue of Price's deposition inasmuch as the discovery deadline had been extended and plaintiff had been advised that he would be made available for deposition. (Mar. 11, 1996, Hr'g Tr., Docket No. 160, at 15.) The court nevertheless asked that the parties so advise if there was something being appealed other than the matters addressed by the court on its own initiative. (May 31, 1996, Tr. at 2, Docket Entry No. 160). No mention was made of the magistrate judge's ruling that the materials sought by way of Price's deposition need not be produced. Subsequently, on October 30, 1996, DuPont responded to plaintiff's discovery request providing the above-

Likewise, the court finds that to the extent that plaintiff may not have received the same assistance in processing her application as was given others, the difference in treatment cannot serve to disturb the Board's determination to deny her application for benefits. Dr. Ramirez testified at trial, without refutation by plaintiff, that an employee may submit any information considered relevant to the benefit application. (Tr. at 73.) However, his review of an employee's plant medical file is generally confined to the medical evaluation report prepared by the plant doctor and whatever other information the plant medical personnel deem relevant to the application, (Tr. at 50, 65.) After review of the medical information submitted, Dr. Ramirez discusses it with the plant physician who developed the medical evaluation report, (Tr. at 49, 64-65), to make certain that he has all information pertinent to the application, (Tr. at 71.) He also asks the plant physician about the specific objective medical evidence showing permanent impairment of function, (Tr. at 71,) There is no evidence to the contrary other than testimony from Crowder, (Tr. at 172), and plaintiff, (Tr. at 216), that they believed that their entire plant medical file

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referenced information about the twenty-three employees at the Belie plant who had received either total and permanent disability benefits or an incapability pension from DuPont. No motion to compel a more complete response was filed. Thus, there is again no merit to plaintiff's contention that she was barred from seeking the discovery necessary to support her claim.

would be forwarded with their applications. However, even assuming that plaintiff and others believed that the Board would review the entirety of their plant medical files, plaintiff cannot overcome the evidence showing that she had notice from the Board that her entire plant medical file was not received or reviewed and that after her file was made available to her attorney, no effort was made to direct the Board to particular medical records which would satisfy the requirement of objective medical evidence of permanent impairment of function immediately prior to her termination. Indeed, plaintiff has yet to point to any document in her plant medical file that would support such a finding. Consequently, she has failed to present any evidence tending to show that the Board's review of her entire medical file would have led to a different result.

Nor does the court find merit to plaintiff's assertion of discriminatory treatment in the manner which she, as compared to others, was otherwise assisted in the application process. As will be seen, *infra*, page 37 the first occasion on which any of plaintiff's treating physicians made reference to a diagnosis of "chronic fatigue," as distinguished from chronic fatigue syndrome, was Dr. Romano's revised report of November 9, 1994.[19] The report was not known to Dr. Holland at the time of his

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[19]See discussion of Dr. Romano's report infra, pages 37-38 and note 20.

examination and plaintiff does not assert that she made its findings known to him. She accordingly cannot complain about Dr. Holland's failure to give her a "neurocognitive examination" or ask her questions about chronic fatigue Syndrome from a prepared list, as it is said he did with Crowder, who apparently had been diagnosed with that condition at the time of her examination by Dr. Holland in conjunction with her disability application.

It is seen, as well, that there are significant differences which would explain greater involvement by Dr. Holland and DuPont supervisors in David Hager's application process. Plaintiff did not conclude that she was disabled and unable to perform her job as a shipping clerk, or any other job, until after she elected to take early retirement. Hager, on the other hand, had been off work on short-term disability for a period of six months before concern was raised about his ability to return to work in a new position. DuPont could reasonably offer Hager, an employee who had not elected early retirement, more assistance in obtaining a medical opinion respecting his ability to return to work than was offered to plaintiff, who had opted for early retirement before reaching the conclusion that she was disabled from further employment.

Plaintiff's contention that it was the responsibility of, alternatively, DuPont, the Board, or Dr. Holland, to obtain the information necessary to support her claim of disabilityl

see, supra, pages 12-13, warrants only brief discussion, There is no language in the Pension Plan or T&P Plan documents that can reasonably be interpreted as placing the burden on anyone other than plaintiff to provide satisfactory medical evidence of disability. Indeed, plaintiff's assertion in that regard fails to refer to any language which would arguably support her position.

What remains is consideration of the reasonableness of the Board's decision based on the medical information presented for its review in the decision-making process to determine whether it abused its discretion in finding that plaintiff's application for benefits should be denied for lack of objective medical evidence that, immediately prior to her termination from employment, she was permanently incapable of performing the duties of shipping clerk with the degree of efficiency required by the company and/or totally and permanently disabled from pursuing any gainful occupation.

Looking at the medical information before the Board at the time of its initial denial, it is seen that the November 1, 1994, medical record of Dr. Rasmussen states that plaintiff told him that she suffered from asthma since 1993 and 'had known hypertension since 1989." (Admin, R. at 18-19.) However, his "DIAGNOSTIC IMPRESSIONS" are limited to "[p]robable bronchial asthma, " "[a]llergic rhinitis," "[c]hronic sinusitis," "[a]rth-

ralgias," and [p]ossible esophageal reflux." (*Id.* at 20.) The report contains no evaluation of plaintiff's ability to work, no mention of any findings other than those based on a physical examination, and no prognosis. (*See id*, at 18-20.)

Dr. Romano's report of July 28, 1994, revised on November 9, 1994,[20] and forwarded to Dr. Ramirez by the Belie Plant on November 16, 1994, (Admin. R. at 27), summarizes plaintiff's conditions as follows:

> IMPRESSION: Based on careful history and thorough physical examination, it is my professional opinion that this patient suffers from Atypical Connective Tissue Disease/Atypical Rheumatic Syndrome/Nonspecific Autoimmune Condition characterized by Symptom Groupings Raynaud's Phenomenon, Myalgias, Immune mediated skin changes, documented arthralgias, documented myalgias, chronic fatigue (> 6 months), documented neurological symptoms including cognitive dysfunction or paresthesias, documented sleep disturbances and burning pain in the chest, breast, arms or axilla.

(Admin, R. at 29.) The report was based on a physical examination conducted before plaintiff terminated her employment. Although it states that plaintiff said that it was hard for her

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[20]As explained more fully in an order entered on September 5, 1996, Dr. Romano's revised report of November 9, 1994, differs from the July 28, 1994, report, which was generated in connection with plaintiff's breast implant litigation, only in that it deletes all references to plaintiff's breast implants in 1984 and their removal in 1986 and to the opinion that plaintiff was suffering from a "compensable condition." (Order of September 5, 1996, Docket Entry 206, at 3-4)

to perform her activities of daily living and that she is tired at the end of her work day, it contains no mention of a diminished ability to work, is not based on any of the kind of materials Dr. Ramirez described as constituting objective medical evidence, and makes no prognosis. Moreover, notwithstanding plaintiff's suggestion to the contrary, it is seen that Dr. Romano does not diagnose chronic fatigue syndrome, but states only that plaintiff had suffered from "chronic fatigue" for more than six months.[21] (*See id.* at 28-29.) Consequently, Dr. Romano's revised report of November 9, 1994, does not demonstrate an abuse of discretion in the decision to deny plaintiff's application for benefits.

The Ashton Care Center medical reports (Admin. R. at 21-25), the progress notes from August 17, 1993, through September 19, 1994, (Admin. R. at 9-17), and the laboratory report of December 17, 1993, (Admin. R. at 7-8), are not readily

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[21]As explained by Dr. Ramirez, supra, page 29, note 16, chronic fatigue of more than six months' duration and severe enough to impair a person 50% in his daily activity are major criteria used by the CDC for diagnosing chronic fatigue syndrome if the fatigue cannot be explained. However, before a diagnosis of chronic fatigue syndrome is warranted, there must also be a presence of at least six minor criteria symptoms. (Id.) Dr. Romano's report does not suffice to demonstrate that plaintiff satisfied the major criteria for chronic fatigue syndrome inasmuch as it does not indicate that her fatigue was severe enough to impair 50% of her daily activity and it does not undertake to rule out other explanations for the fatigue, such as her "documented sleep disturbances." Further, plaintiff points to no finding of Dr, Romano which would show a minimum of six minor criteria symptoms.

decipherable. However, they do not appear to contain any information about plaintiff's ability to perform work and plaintiff does not point to any portion of them as showing that she was incapable of working just prior to her termination. The court thus concludes that they do not support a finding of an abuse of discretion in the Board's decision.

Dr. Holland's medical evaluation of October 19, 1994, based on his physical examination of plaintiff after she ceased working, but before she was terminated from the payroll, contains the diagnoses of "[p]ossible early endometriosis - possible peptic ulcer disease - recurrent herpetic lesion buttock - asthma medial epicondylitis right elbow - hypertension - history of ex suggesting depression." (Admin. R. at 4.) The report states that the prognosis is "[p]robably good with appropriate management." (*Id.* at 3.)

At the bottom of Dr. Holland's medical evaluation report is a portion to be completed by DuPont's medical division as its evaluation of the report and any attachments. It is completed and signed by Dr. Ramirez. It notes his conclusion that plaintiff's medical condition is not such that she "is not capable of pursuing any significant gainful employment" and not such that she "may require special job consideration." (*Id.*) In addition, it states his opinion that her prognosis for life,

prognosis for recovery, prognosis for improvement, and prognosis for reliably performing activities of usual work are "[g]ood."

As the above-summarized medical records demonstrate, the Board was not presented with any medical information evaluating plaintiff's ability to work other than the report from Dr. Holland which indicated that her prognosis was "[p]robably good with appropriate management." There being no medical evidence or opinion tending to show an inability on plaintiff's part to perform any of her duties as a shipping clerk or any other job immediately prior to her termination date, there is no basis for finding an abuse of discretion in the Board's initial December 5, 1994, decision to deny her application for benefits.

Plaintiff thereafter submitted additional information. A November 1, 1994, chest x-ray requested by Dr. Rasmussen because of plaintiff's asthma and shortness of breath gave the impressions: "1) No acute cardiopulmonary changes, 2) Accentuated bronchovascular markings." (Admin. R. at 46,) Laboratory analyses of blood and urine done that same date at the Southern West Virginia Clinic show "out of range" readings in only three of fourteen aspects of the urinalysis test.[22] (Admin. R. at 47-48.) The balance of the newly presented information consists of

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[22]The degree of variation is described as "SMALL" and "MOD" for two analyses. (Admin. R. at 47.) The third factor, that being for `WBC," is listed solely as "8-12" out of range. (Id.)

a progress note from Michael Kostenko, D.O., based on a February 9, 1995, examination of plaintiff, with an attached report of "NUTRIENT MINERAL LEVELS" and "TOXIC MINERALLEVELS" from a March 6, 1995, sample. (Admin. H. at 42-44.) The progress note contains a list of "[b]asic assessment to points without benefit of having chemicals in contact and more awareness industrial chemicals exposures, etc." (Admin. R. at 42) (as in original), which list of "[b]asic assessment to points" consists of "Chronic Fatigue Fibromyalgia," "Immune System Distraction," "Probable breakdown of immune relationship," "History of cholecystectomy," "Chronic dyspepsia," "Evolving Sinusitis," "Herpes Zoster," and "Sick Building Syndrome." (*Id.* at 42-43.)

While it may be conceded that the new submissions contain objective medical findings such as x-ray and laboratory reports, they contain no definitive diagnoses, no information about plaintiff's ability to perform work, and no opinions on the anticipated duration of any medical problems. In sum, nothing in the new information tends to show that plaintiff was permanently disabled immediately prior to her termination. The Board did not abuse its discretion in denying her appeal.

In her October 28, 1996, request for reconsideration, plaintiff submitted methacholine challenge testing results from Dr. Rasmussen and medical reports from Dr. Cheney and Dr. Preston, who practices clinical psychophysiology. The methacholine

challenge report, dated June 25, 1996, states that the "findings are consistent with bronchial asthma," (Admin. R. at 92), and a pulmonary function report of that same date gives a "computerized interpretation" of "[m]ild obstructive disease," (Admin. R. at 93). A July 23, 1996, letter from Dr. Cheney states that plaintiff's "local physician has diagnosed her with Chronic Fatigue Syndrome," and that she will undergo the "usual" testing for that condition.[23] (Admin. R. at 58-59.) A later report from Dr. Cheney, dated September 19, 1996, summarizes laboratory results found to be "quite consistent with CFS and may be the primary reason for disability." (Admin. R. at 63.) It also states: "FINAL ASSESSMENT: Chronic Fatigue Syndrome with evidence of immune activation which is somewhat suggestive of a possible active viral infection, with evidence of a number of metabolic defects consistent with this disorder, and with evidence of HP axis suppression on exercise testing." (*Id.*) Nevertheless, inasmuch as the September 19, 1996, report also states that plaintiff related in a telephone consultation "that she has been doing better since she was seen in July, particularly with

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[23]Based on the court's review of the administrative record, Dr. Cheney's reference to a local physician's diagnosis of chronic fatigue syndrome must be either to the report of Dr. Romano, whose offices are in Wheeling, West Virginia, dated July 28, 1994, and revised on November 9, 1994, which states that plaintiff suffered from "chronic fatigue," see, supra, pages 36-37 and note 20, or to the statement of Dr. Hostenko of Beckley, West Virginia, that plaintiff apparently has a fibromyalgia chronic fatigue syndrome, see, supra, page 41.

fatigue and energy," it cannot be said that it shows a permanent and total disability and inasmuch as it only assesses plaintiff's condition at a time that is two years after her last day at work, it cannot be said that it is evidence that plaintiff was disabled immediately prior to her termination from employment. Similarly, the October 9, 1996, report from Dr. Preston, which states that based on plaintiff's "computerized EEG (brain map)," her "topographic brain mapping results" resemble that of patients suffering from chronic fatigue and immune dysfunction syndrome and that the abnormalities in her EEG "are most like people" who have that syndrome sheds little, if any, light on whether plaintiff was disabled in November 1994.

Inasmuch as plaintiff failed to present objective medical evidence of permanent disability as existing immediately prior to her termination from employment, the court, based on the administrative record, concludes that substantial evidence supports the Board's decision to deny her application for an incapability retirement pension and for total and permanent disability benefits. There being no abuse of discretion, the plaintiff having failed to support her claim with satisfactory medical evidence, the decision of the Board will be upheld.

For the reasons stated, it is **ORDERED** that plaintiff take nothing on her Count V ERISA claim and that judgment be, and it hereby is, entered in favor of defendant E. I. duPont de Nemours and Company with respect to that claim,

The Clerk is directed to forward copies of this order to all counsel of record.

DATED: March 31, 1998

/s/ JOHN COPENHAVER; JR.
United States District Judge

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Appendix
UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DEBORAH H. COBB,
Plaintiff-Appellant,

v.

E. I. DUPONT DE NEMOURS & COMPANY, a Delaware corporation; RICHARD KNOWLES; ELBERT PRICE; LESTER GORE; SCOTT RENDINELL; LOU P. MICELI,
Defendants-Appellees,

and

PAMELA POKRZYWA; REUBEN W. HOLLAND, M.D.; ROBERT L. LEADBETTER, M.D.,
Defendants.

No. 98-1642

Appeal from the United States District Court
for the Southern District of West Virginia, at Charleston.
John T. Copenhaver, Jr., District Judge.
(CA-95-743-2)

Submitted: July 7, 1998

Decided: August 4, 1998

Before WIDENER, HAMILTON, and WILLIAMS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

Deborah H. Cobb, Appellant Pro Se. David Besserer Thomas, SPILMAN, THOMAS & BATTLE, P.L.L.C., Charleston, West Virginia; Larry Andrew Winter, David Dale Johnson, III, CAREY, HILL, SCOTT, WINTER & JOHNSON, P.L.L.C., Charleston, West Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Deborah H. Cobb appeals from the district court judgment dismissing her action against her former employer, E.I. DuPont de Nemours & Co. ("DuPont"), and eight of its employees. Cobb commenced the action in state court and alleged handicap discrimination, gender discrimination, sexual harassment, fraudulent concealment, intentional infliction of emotional harm, all in violation of West Virginia law, and a violation of the Employment Retirement Income Security Act of 1974, 29 U.S.C.A. §§ 1001 - 1461 (West 1985 & Supp. 1998) ("ERISA"). The Defendants removed the complaint to federal district court on the basis of Cobb's ERISA claim. On appeal, Cobb challenges the court's jurisdiction and the dismissal of her handicap discrimination, fraudulent concealment, sexual harassment and ERISA claims on the basis of allegedly improper court orders limiting discovery or prohibiting evidence. Finding no reversible error, we affirm.

Cobb's contention that the court was without subject matter jurisdiction is frivolous. Cobb's complaint plainly stated a claim under ERISA. In response to the notice of removal, Cobb conceded that her ERISA claim was within the jurisdiction of the court. *See* 29 U.S.C.A. § 1132(e)(1) (West 1985 & Supp. 1998). Removal was proper under 28 U.S.C. § 1441(b) (1994), because the district court has jurisdiction

over civil actions arising under the laws of the United States without regard to the citizenship or residence of the parties. Furthermore, her remaining state claims were properly considered by the court. *See* § 1441(c).

Cobb's challenges to the court's dismissal of her handicap discrimination, fraudulent concealment and sexual harassment claims on the basis of limitations placed on her ability to conduct discovery and submit evidence are without merit. The district court has broad discretion concerning the admissibility of testimony and the scope of discovery. *See Hinkle v. City of Clarksburg*, 81 F.3d 416, 426 (4th Cir. 1996); *Bristol Steel & Iron Works v. Bethlehem Steel Corp.*, 41 F.3d 182, 188 (4th Cir. 1994). Finally, the court did not err in excluding medical evidence outside the administrative record in deciding the ERISA claim. *See Sheppard & Enoch Pratt Hosp., Inc. v. Travelers Ins. Co.*, 32 F.3d 120, 125 (4th Cir. 1994).

Accordingly, we affirm the district court's judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid in the decisional process.

AFFIRMED